Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

STATE CONCERN TURKMENNEFT,

Petitioner,

v.

BRIDAS S.A.P.I.C.; BRIDAS ENERGY INTERNATIONAL, LTD.; INTERCONTINENTAL OIL & GAS VENTURES, LTD.; BRIDAS CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court twice has stated, without further explanation, that arbitration awards are subject to judicial review for "manifest disregard of the law." The lower courts are divided as to the meaning and scope of that standard. The questions presented are as follows:

1. In what circumstances is an arbitration award in manifest disregard of law?

2. Did an international arbitration panel manifestly disregard the law by discounting to present value a joint venture's lost equity revenues over 25 years by a rate that the arbitrators knew applied only to short-term debt of the same enterprise, thereby inflating awarded damages by $200 million above actual damages?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court of appeals is as follows:

Defendants-Appellants: State Concern Turkmenneft; Government of Turkmenistan.

Plaintiffs-Appellees: Bridas S.A.P.I.C.; Bridas Energy International, Ltd.; Intercontinental Oil & Gas Ventures, Ltd.; Bridas Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner State Concern Turkmenneft, a commercial entity created by the Government of Turkmenistan, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 345 F.3d 347. The order of the court of appeals denying petitioner's petition for rehearing or rehearing en banc (App., *infra*, 71a-72a) is unreported. The opinion of the district court (App., *infra*, 29a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2003. Petitioner's timely petition for rehearing and rehearing en banc was denied on October 9, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This Court twice has noted that arbitration awards are subject to judicial review for manifest disregard of the law. In *Wilko* v. *Swan*, 346 U.S. 427, 436-437 (1953), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), the Court stated that "interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation" (emphasis added); see also *id.* at 440 (Frankfurter, J., dissenting) ("Arbitrators may not disregard the law"). In *First Options, Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995), the Court characterized this statement from *Wilko* as meaning that parties are "bound by

[an] arbitrator's decision not in 'manifest disregard' of the law."

Based on those statements, the federal courts of appeals all have adopted the manifest disregard of law standard as a ground for judicial review of arbitration awards in addition to those specified in the Federal Arbitration Act, 9 U.S.C. § 10 ("FAA"). However, the circuit courts are sharply divided over the meaning and scope of that standard. In the Seventh Circuit, for example, only awards that affirmatively order parties to violate the law may be vacated under the manifest disregard standard. In the Second Circuit, in contrast, an award may be vacated under the manifest disregard standard so long as the arbitrator knew of but refused to apply or ignored a well-defined and governing legal principle. The Fifth Circuit, from which this case arises, adds an additional requirement to the Second Circuit test, namely, that upholding the award would result in significant injustice. The circuits also conflict over whether the arbitrator's disregard must be willful, whether such disregard must be manifest on the face of the award, and whether a manifest disregard of contract language or evidence suffices to satisfy the standard. See *infra*, Part I.

With the number of disputes submitted to arbitration growing rapidly, reviewing courts, arbitral parties, and the arbitral process are frustrated by the uncertain meaning and scope of the manifest disregard of law standard. Forum shopping and unwarranted judicial review proceedings are the inevitable result. Review by this Court is warranted to resolve this conflict over an important and frequently recurring issue. This case provides an ideal vehicle to articulate a manifest disregard of law standard that both accords proper deference to arbitrators and guards against rogue awards. Under such a standard, the damages award in this case, which the arbitrators knew conflicted with well-defined and governing law and which provided respondents with a $200 million windfall, cannot stand. See *infra*, Part II.

Factual Background. In 1993 petitioner State Concern Turkmenneft, a commercial entity created by the Government of Turkmenistan ("Government"), entered into a joint venture agreement with respondents, a family of Argentine companies, to continue development and exploitation of oil and gas fields in southwestern Turkmenistan. The agreement by its terms was governed by the laws of England. RE12 at 6339.[1] A variety of disputes culminated in the termination of oil exports and effectively ended joint venture operations. In 1996, respondents filed arbitration claims with the International Chamber of Commerce against petitioner and the Government. Hearings took place in Houston, Texas before a panel of three arbitrators.

In the first of four partial awards, the arbitrators ruled 2-1 that petitioner had repudiated the contract and that, if respondents accepted the repudiation, the contract would then terminate. RE5 at 4708-10. The majority also offered an advisory opinion—"for the consideration and guidance of the parties"—that "if [respondents] were to accept repudiatory conduct * * * and thus bring the JV Agreement to an end, their damages would be calculated * * * using a discount rate of 10.446%." *Id.* at 4704, 4662. The arbitrators noted that 10.446% was the interest rate that the joint venture agreement applied to the loan by respondents of petitioner's share of joint venture expenses, referred to as the "Foreign Party Contribution" or "FPC." Pursuant to the agreement, the FPC was to be recouped out of petitioner's half of joint venture revenues. RE5 at 4706; RE12 at 6363. According to respondents' own projection, the FPC would be fully recouped in the first few years of the venture.

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[1] "RE" followed by the tab and page number refers to petitioner's Record Excerpts in the court of appeals. "R_" refers to the full Record in the court of appeals.

Both parties agreed that, under controlling English law and the terms of the contract, remedies were limited to actual damages. Both parties' experts used the same method to determine damages, calculating the net present value of the revenues that respondents would have received over 25 years had the contract been fully performed. The arbitrators adopted that methodology but substituted a discount factor to convert projected future revenues to present value that no expert had recommended and in support of which no evidence had been presented.

The two payment streams—the short-term FPC loan and the long-term joint venture revenues—were of radically different risk, duration, and quality. On the one hand, the FPC was a small fraction of expected total revenues, payment of the FPC debt was to be made on a priority basis out of petitioner's half of joint venture revenues, and the debt would be repaid in full within three to four years. On the other hand, projected total revenues would be earned, if at all, over the 25-year remaining life of the project and were subject to all the uncertainties of exporting oil and gas from Central Asia, including limited transportation, regional wars, political instability, earthquakes, weak economies, customer payment shortfalls, and competition from larger suppliers. R4120-23, 4130-32, 4161-67, 4298-99, 4316-37.

Despite the contractual specification that the 10.446% rate applied to the FPC loan, the majority arbitrators applied it to discount the far riskier stream of overall project revenues. Their only explanation was that "in the circumstances of this case [it] reflects the reality of the factual context of June 30, 1997, the notional date for the receipt of money, and the terms of the agreement." RE5 at 4706. The arbitrators did not explain how the short-term and relatively secure FPC debt rate could *possibly* apply in the actual "factual context" of a long-term and risky equity payment stream.

Recognizing the opportunity for a windfall, respondents immediately accepted repudiation and termination of the agreement and thereafter insisted that their reliance on the arbitrators' advisory ruling precluded any change to the provisional discount rate. RE15 at 1223; RE23. Respondents never attempted to justify the arbitrators' selected rate on the merits, understandably so in light of their experts' earlier admission that use of a below-market discount rate would provide respondents with an award above an equivalent revenue stream. RE16 at 7578-79; R3954. In contrast, petitioner submitted uncontroverted evidence that the FPC rate was inappropriate, logically inconsistent with the purpose of discounting the income stream to equivalent present value, and barred by English law and the terms of the contract, and that the most appropriate rate, based on comparable income streams, would be in the range of 19.1%. R4312-15, 4345, 4928-36; RE22.

In their third partial award, the arbitrators noted petitioner's arguments but refused to address the logical contradiction between applying the shorter-term and more secure FPC loan rate to the longer-term and far riskier joint venture revenue stream. Instead, the majority stated merely that it had considered all risks and selected a rate higher than respondents' and lower than petitioner's proposed rates. RE7 at 4590-93. The divided panel awarded respondents damages of over $500 million plus interest, reaffirming its advisory opinion as to the discount rate with the terse observation that "the conclusions concerning the discount factor and price of oil remain the opinion of the arbitrators." RE7 at 4593. If the arbitrators had used the proper 19.1% discount rate, which respondents' experts conceded was a "fair market value rate of return," damages would have been some $200 million lower. R3924; RE16 at 7573-74.

In their final award, the majority denied without comment petitioner's request to reconsider and correct the discount rate. Once again, they refused to address the logical

contradiction inherent in their ruling, asserting only that "[t]he resulting rate was and remains their judgment of the rate that is appropriate in the circumstances of this case." RE9 at 5231.

The Decisions Below. The district court denied petitioner's motion to vacate or modify the award of damages for, *inter alia*, manifest disregard of controlling law. App., *infra*, 29a. The district court did not address whether the majority's selection of a discount rate inapplicable on its face to the joint venture's revenue stream manifestly disregarded English law and the terms of the contract by placing respondents in a better position than if the contract had been performed. Instead, the district court found its authority too "limited" to "second-guess a factual finding of the arbitration panel," found petitioner's citations to English law to be "vague," and justified the chosen rate on the ground that it was higher than originally proposed by respondents. App., *infra*, 63a.

The Fifth Circuit affirmed on this issue, ruling that petitioner had challenged "the merits" of the arbitrators' discount rate ruling and sought to have the court "second-guess the arbitrators' determination." App., *infra*, 25a. In effect, the court of appeals did not review the arbitral award at all. Instead, it observed that the arbitral panel considered "a variety of evidence," selected a rate that "it deemed most appropriate," and made a factual determination that was entitled to a "high degree of deference." *Id.* at 26a. Like the arbitral majority and the district court before it, the Fifth Circuit did not address the logical contradiction that ineluctably caused the awarded damages to exceed actual damages by some $200 million.[2]

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[2] The Fifth Circuit vacated and remanded the district court's ruling upholding the award against the Government, which was not a signatory to the joint venture agreement. App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

Petitioner does not seek to have the courts "second-guess the arbitrators' determination" of the appropriate discount factor. App., *infra*, 25a. The questions presented do not involve mere disagreements with the arbitrators' contract construction, factfinding, credibility assessments, or procedural rulings. This case does not, like *Till* v. *SCS Credit Corp.*, No. 02-1016 (U.S. argued Dec. 2, 2003), ask the Court to decide how a proper discount rate is to be determined. Rather, petitioner challenges the arbitrators' defiance of established and governing law by rendering an award far in excess of actually damages, the ineluctable result of using a discount rate that the parties had agreed was applicable to the short-term and relatively secure debt of their joint enterprise and thus *a fortiori could not suffice* to discount the far longer and riskier revenue stream of that same enterprise. This manifest disregard of the law allowed the majority arbitrators to avoid acknowledging the consequences of their ill-conceived advisory ruling, which declared the rate with no evidentiary support and before any right to damages had accrued, and gave respondents a $200 million windfall at petitioner's expense. Petitioner seeks this Court's review not only to correct this injustice but to ensure that U.S. courts apply the manifest disregard of law standard meaningfully and uniformly to protect against such rogue arbitration awards.

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER THE MEANING OF THE MANIFEST DISREGARD OF LAW STANDARD OF REVIEW.

The courts of appeals repeatedly have recognized that they are divided over the meaning and scope of the manifest disregard of law standard and that guidance from this Court is required. The D.C. Circuit, for example, has stated that the manifest disregard standard "has not been defined by the

Court" and that "the circuits have adopted various formulations." *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-1487 (D.C. Cir. 1997). The Seventh Circuit, after noting confusion among its own panels over the meaning of manifest disregard, observed that "[t]he law in other circuits is similarly confused." *George Watts & Son* v. *Tiffany & Co.*, 248 F.3d 577, 579-580 (7th Cir. 2001). Judge Easterbrook attributed that confusion to this Court's "dictum in *Wilko* and *First Options*," which he found "opaque," "unexplained," and "unilluminated by a concrete application." *Id.* at 580.

Commentators, too, consistently have recognized and bemoaned this longstanding and apparently intractable conflict. See Marcus Mungioli, Comment, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 St. Mary's L.J. 1079, 1105 (2000) (noting "the inconsistency with which the manifest disregard of the law standard is defined and applied"); Adam Milam, Comment, *A House Built on Sand: Vacating Arbitration Awards for Manifest Disregard of the Law*, 29 Cumb. L. Rev. 705, 707 (1998) (the "circuits differ regarding the interpretation and application of manifest disregard of the law"); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 811-812 (1996) (expressing "concern" over the "oblique" reference to manifest disregard in *Wilko* and "the subsequent lack of guidance from the Court as to its proper meaning and effect"); Michael O'Mullan, Note, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 Fordham L. Rev. 1121, 1122 (1995) (noting "great confusion" among practitioners and "division among the federal courts of appeals" over proper application of the manifest disregard standard); Brad Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the 'Manifest Disregard' of the Law Standard*, 27 Ind. L. Rev. 241, 250

(1993) (since *Wilko*, courts have had "difficulty determining what was meant by the phrase 'manifest disregard' of the law"); *id.* at 262 ("Without guidance from the Court, the law in the circuits will remain hopelessly confused and inconsistent").

In particular, the federal courts of appeals are deeply divided over the breadth of the manifest disregard of law standard.

The Seventh Circuit takes the narrowest view. It permits an award to be vacated for manifest disregard only if an arbitrator "direct[s] the parties to violate the law." *George Watts*, 248 F.3d at 580. The Seventh Circuit's rationale in *George Watts* was that "an arbitrator acts as the parties' agent and as their delegate may do anything the parties may do directly." *Ibid.* The court claimed support for that ultra-narrow standard in this Court's opinion in *Eastern Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57 (2000). The Seventh Circuit construed *Eastern Associated Coal* to direct that a court may vacate an arbitration award on public policy grounds only "when the arbitrator has commanded the parties to violate legal norms." 248 F.3d at 580. Judge Williams, concurring in the judgment only, opined that the panel's opinion had "effectively rejected the manifest disregard doctrine" and misconstrued *Eastern Associated Coal*, which concerned a different subject, vacatur of labor arbitration awards on public policy grounds, and never addressed manifest disregard. *Id.* at 581-583.

The Fourth Circuit's formulation of the manifest disregard of the law standard is broader but still quite narrow. "[T]he single question is whether the award, however arrived at, is rationally inferable from the contract." *Apex Plumbing Supply, Inc.* v. *U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir. 1998). This test allows reviewing courts to develop their own rationale for confirming an award even if the arbitrator's rationale cannot be reconciled with the governing law.

The Second Circuit's test is broader. It authorizes an award to be vacated for manifest disregard if (1) the arbitrators "knew of a governing legal principle yet refused to apply it or ignored it altogether," and (2) such legal principle was "well defined, explicit, and clearly applicable" to the case. *Hardy* v. *Walsh Manning Sec., L.L.C.*, 341 F.3d 126, 129 (2d Cir. 2003). That formulation has been adopted by several other circuits as well.[3] Although the Second Circuit consistently reiterates this standard, in practice it is sometimes less restrictive. In *Hardy*, for example, the Second Circuit found that an arbitration award manifestly disregarded governing New York law by imposing respondeat superior liability on a fellow employee of a wrongdoer. Under "the most liberal reading of the award," the court explained, it "contains a fundamental mistake of law." *Id.* at 133. This "fundamental mistake of law" standard is probably the broadest definition of manifest disregard of law.

The First Circuit offers three broad formulations. It authorizes an award to be vacated for manifest disregard of the law if any of the following is true: the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact." *Prudential-Bache Sec., Inc.* v. *Tanner*, 72 F.3d 234, 238 (1st Cir. 1995). The conflict with the Seventh Circuit's test is plain, since none of these three possibilities conditions

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[3] For example, in the Sixth Circuit "[a]n award is in manifest disregard if (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Nationwide Mut. Ins. Co.* v. *Home Ins. Co.*, 330 F.3d 843, 847 (6th Cir. 2003) (vacating award); see also, *e.g.*, *LaPrade* v. *Kidder, Peabody & Co.*, 246 F.3d 702, 706 (D.C. Cir. 2001) (upholding award).

vacatur on an arbitral order to violate the law. The first possibility appears closer to the "fundamental mistake" standard applied in *Hardy* than to the standard Second Circuit test; the second possibility grounds review of an arbitral award in judicial review standards, an approach generally rejected by other circuits; and the third possibility appears similar to the "clear error" standard applicable to judicial findings of fact, an approach also rejected by other circuits.

The Fifth Circuit requires satisfaction of two requirements before an award may be vacated for manifest disregard of the law. First, "where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld." Second, even if the arbitrators manifestly did act contrary to the applicable law, "the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between the parties." App., *infra*, 24a, quoting *Williams* v. *CIGNA Fin. Advisors, Inc.*, 197 F.3d 752, 762 (5th Cir. 1999). No other circuit has adopted the "significant injustice" requirement, which adds an additional obstacle to vacatur for manifest disregard to the Second Circuit's test.

The courts also are divided over whether the arbitrator's disregard must be intentional, compare *Sheldon* v. *Vermonty*, 269 F.3d 1202 (10th Cir. 2001) (disregard must be "willful"), with *Gas Aggregation Servs., Inc.* v. *Howard Avista Energy, LLC*, 319 F.3d 1060, 1069 (8th Cir. 2003) (award may be vacated if arbitrator cites but "proceeds to ignore" the law); whether the arbitrator's disregard must be reflected in the record or may be inferred, compare *Michigan Mut. Ins. Co.* v. *Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995) (disregard "must be clear from the record"), with *Montes* v. *Shearson Lehman Bros.*, 128 F.3d 1456, 1462 (11th Cir. 1997) ("there is nothing in the record to refute the suggestion

that the law was disregarded"); and whether the absence of a written opinion precludes or supports manifest disregard, compare *University Commons-Urbana, Ltd.* v. *Universal Constructors, Inc.*, 304 F.3d 1331, 1337 (11th Cir. 2002) (refusing to consider applicability of manifest disregard in absence of written opinion or transcript), with *Halligan* v. *Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (vacating for manifest disregard and taking "into account" arbitrators' failure "to explain the award").

In addition, some circuits deem an award conflicting with plain contract language to be in manifest disregard of the law. See *Missouri River Servs., Inc.* v. *Omaha Tribe*, 267 F.3d 848, 855 (8th Cir. 2001) (vacating award); *Wonderland Greyhound Park, Inc.* v. *Autotote Sys., Inc.*, 274 F.3d 34, 36 (1st Cir. 2001). Others deem such a standard appropriate only in labor and not commercial cases. *E.g.*, *Westerbeke Corp.* v. *Daihatsu Motor Co.*, 304 F.3d 200, 221-222 (2d Cir. 2002). And one court has invoked a "manifest disregard of the evidence" standard. *Halligan*, 148 F.3d at 204 (vacating award where "arbitrators manifestly disregarded the law or the evidence"); see also *Montes*, 128 F.3d at 1462 (vacating award for manifest disregard of the law where "the evidence to support the award was marginal"); but see *Coutee* v. *Barington Capital Group*, 336 F.3d 1128, 1133 (9th Cir. 2003) (finding no manifest disregard of the law but noting that "legally dispositive facts" may be "so firmly established that an arbitrator cannot fail to recognize them without manifestly disregarding the law"); *GMS Group* v. *Benderson*, 326 F.3d 75, 79 (2d Cir. 2003) (limiting *Halligan*).

Finally, state courts are divided over whether the Supremacy Clause requires them to accept the manifest disregard standard when they review arbitration awards subject to the FAA. Compare *Warbington Constr. Inc.* v. *Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 859 (Tenn. App. 2001) (rejecting manifest disregard standard in case subject to the FAA); *Siegel* v. *Prudential Ins. Co.*, 79 Cal. Rptr. 2d

726, 740 (App. 1998) (same), with *Edward D. Jones & Co.* v. *Schwartz*, 969 S.W.2d 788, 795 (Mo. App. 1998) (accepting manifest disregard standard in case subject to the FAA).

This Court should fashion a single standard for determining whether an arbitrator has acted in manifest disregard of the law. "The fact that the manifest disregard standard is a product of common law, rather than statute, makes it no less essential to the judicial review of arbitration awards." *Hoeft* v. *MVL Group, Inc.*, 343 F.3d 57, 65 (2d Cir. 2003). A clear and well-defined standard will promote uniformity in the application of federal arbitration law and advance the "strong federal policy favoring arbitration." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 290 (2002). The prevailing disarray among the circuits invites forum shopping and a race to the courthouse between the prevailing and losing party. See *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984) (rejecting interpretation of arbitration law that would "reward forum shopping" and make a right provided by arbitration law "dependent for its enforcement on the particular forum in which it is asserted"); *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 200-201 (2000) (FAA does not restrict venue of judicial review actions).

Contracting parties can better make informed choices if they need not guess at the standards that would govern a judicial review proceeding. Indeed, parties are more likely to agree to arbitrate in the first place, especially where the stakes are large, if they know that awards made in manifest disregard of the law will be subject to meaningful judicial review. See David Lipsky & Ronald Seeber, *Top General Counsels Support ADR*, 8-Apr. Bus. L. Today 24, 27 (1999) (54% of surveyed in-house counsel reported that lack of substantive judicial review discouraged them from using arbitration). Particularly in the context of large transnational investments, absence of an effective remedy for extreme

deviations from governing law promotes uncertainty. As one PepsiCo executive has put it: "We're happy with finality, except in complicated international cases where there's a lot of money involved. Sometimes we will not put in arbitration clauses just because we think the exposure could be very big. We're concerned that it's too final for us." *I'll See You Out of Court*, Corporate Legal Times, Feb. 2000, at 17. A standard of review that provides a remedy when arbitrators flout governing law and award unwarranted windfalls will help to alleviate such concerns.

II. THE COURT OF APPEALS FAILED TO GIVE PROPER EFFECT TO THE MANIFEST DISREGARD OF LAW STANDARD OF REVIEW.

Definition of the manifest disregard of law standard requires careful balancing of important competing interests. By agreeing to arbitrate, parties seek to reduce the uncertainties associated with litigation. They obtain the opportunity to choose decision-makers, to assert control over the decision-making process, and, in the international arena, to remove disputes from the national courts of the other party and thereby decrease the risk of doing business across national boundaries. An overly broad standard of review would undermine the finality of arbitral awards and thus the predictability for which the parties bargained. An unduly narrow standard of review also would undermine predictability by providing no effective remedy when arbitrators refuse to apply the law that the parties agreed would control the outcome.

This Court long ago recognized the importance of distinguishing between vacating an arbitration award for a "gross mistake" as opposed to a "mere error of judgment." *Burchell* v. *Marsh*, 58 U.S. (17 How.) 344, 350 (1854). To be sure, the Court was not discussing manifest disregard of the law. But the concern animating the reference to review for gross error in *Burchell* was much the same as the references

to review for manifest disregard of the law in *Wilko* and *First Options*. In each case, the Court recognized that, in infrequent but compelling circumstances, meaningful protection must be provided against unfettered departures from the law. Otherwise, arbitrators would have free rein to declare their own law, generating uncertainty that would undermine the benefits of arbitration. For that reason, as noted above, all the courts of appeals have adopted manifest disregard and in some cases additional standards for judicial review of arbitral awards beyond those specified in the FAA.[4]

At bottom, arbitration is a matter of contract. Arbitral parties would never agree to authorize an award that is objectively inconsistent with fundamental principles of controlling law or to authorize arbitrators deliberately to disregard that law. To give effect to the intent of the parties, the manifest disregard of law standard must be defined to authorize courts to provide relief from deviant awards of the type at issue here. Whatever the precise formulation, under any meaningful standard the arbitrators in this case manifestly disregarded the law by awarding vast damages that they knew could not be reconciled with logic or law.

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[4] English courts also recognize the need for protection against rogue awards. See Arbitration Act 1996, c. 23, § 69 (1996) (Eng.) (granting leave to appeal an arbitral award where the arbitrator was "obviously wrong" on a question of law); see also *HOK Sport Ltd.* v. *Aintree Racecourse Co.*, [2003] B.L.R. 155, [2003] Lloyd's Rep. P.N. 148, 2002 WL 31676330 (T&CC 2002) (granting leave to appeal award because arbitrator took "obviously wrong" approach to quantifying damages). It is well established that the manifest disregard of the law standard applies to international arbitration awards rendered in the United States as well as to purely domestic awards. See *Yusuf Ahmed Alghanim & Sons* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

A. Governing And Clearly Applicable Legal Principles Barred The Discount Rate Applied By The Arbitrators.

Rates used to discount an income stream must reflect the risk that the income will not be realized. R. Brealey & S. Myers, PRINCIPLES OF CORPORATE FINANCE 15 (7th ed. 2003) (rates differ because a "safe dollar is worth more than a risky one"). Governing English law incorporates that finance principle, equating damages for breach of contract with the market value of the lost benefit discounted by the probability of recovering it. See Harvey McGregor, MCGREGOR ON DAMAGES §§ 810, 29 (16th ed. 1997).

Thus, where the projected loss is less than certain, projected damages "must be discounted by [the claimant's] chances of success in recovering it." 1 CHITTY ON CONTRACTS § 27-034 (H.G. Beale, gen. ed., 28th ed. 1999). In that process, "'the more the contingencies, the lower the value of the chance or opportunity of which the plaintiff was deprived.'" *Ibid.*; see *Dir. of Bldgs. & Lands* v. *Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111, 132 (P.C. 1995) (the "greater the risk" of failure to receive "future payments," the "higher the rate of return [claimant] will require"). This Court too has held that, as a matter of law, discount rates must reflect "varying risks" to establish the necessary equivalence between a future payment stream and present value. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 17 n.8 (1949); see also *Meilink* v. *Unemployment Reserves Comm'n*, 314 U.S. 564, 567 (1942) (interest rates vary "according to the hazard of particular classes of loans").

The court of appeals recognized that, pursuant to this legal principle, the arbitrators were to "establish present-value damages equivalent to the stream of revenues projected to have been lost as a result of the breach." App., *infra*, 26a. The court also properly recited the corollary principle that the discount rate must be applicable to "this particular income

stream." *Ibid.*; see *Energy Capital Corp.* v. *United States*, 302 F.3d 1314, 1333 (Fed. Cir. 2002) (rejecting standard interest rate in favor of market rate applicable to particular payment stream).

Yet, the award on its face did not employ a rate applicable to "this particular income stream." The particular income stream to be discounted to present value was the stream of net revenues that respondents were to earn over the venture's entire 25-year life, representing respondents' return on its 50% equity interest. But to determine the value of that income stream, the arbitrators borrowed the FPC interest rate established for a stream of short-term debt payments payable out of the revenues of the joint venture's first few years. With both streams issuing from the same enterprise, comparing their relative risks is straightforward. The stream of lost revenues was long-term (25 years) and rested on a risky oil and gas joint venture in a politically volatile part of the world. The FPC repayment stream was short-term (3-4 years), relatively secure (debt with priority over equity), and higher quality (only a small portion of the overall project revenue stream). It was the overall project revenue stream, and the expectation of realizing it in the face of the formidable obstacles confronting the venture, that represented the "bargain" lost by respondents.

The court of appeals' statement that "the selection of a discount factor is a question of fact" (App., *infra*, 25a) misses the point: No matter what rate might suffice to discount the overall revenue stream, the rate applicable to the FPC debt *could not possibly* perform that function. In fixing the FPC rate, the parties established that the rate applicable to overall revenues had to be higher, because the risk, quality, and duration of the overall revenue stream entailed greater uncertainty than the FPC payments, which were but a small portion of the overall revenues. The choice of a proper discount rate certainly rests on factual findings, but "legally dispositive facts," as some circuits have recognized, may be

"so firmly established that an arbitrator cannot fail to recognize them without manifestly disregarding the law." *Coutee*, 336 F.3d at 1133; see also *Halligan*, 148 F.3d at 204 (factfinding that "strain[s] credulity" may manifestly disregard the law); *Montes*, 128 F.3d at 1462 (award vacated for manifest disregard of the law where "the evidence to support the award was marginal").

The court below, in contrast to the approach of the Ninth, Second, and Eleventh circuits in the above-cited cases, applied an unduly rigid understanding of the manifest disregard standard. As a result, it upheld an award disregarding the "firmly established" and "legally dispositive" fact that a discount rate sufficient to account for the multiple risks inherent in a long-term stream of equity revenues *a fortiori* must be higher than the rate that the parties had agreed was applicable to an inherently less risky stream of debt repayments payable off the top of that very revenue stream.[5]

By using the FPC rate to discount the higher-risk, lower-priority, and much longer-term revenue stream, the arbitrators placed respondents in a far better position than they would have occupied but for the breach, in contravention of controlling law. See *Albacruz (Cargo Owners)* v. *Albazero (Owners)*, [1977] A.C. 774, 841 (precluding damages for breach of contract beyond what would have been achieved absent breach); RE16 at 7579; RE17 at 7633 (testimony of respondents' experts that award calculated at below-market discount rate would allow respondents to buy multiple replacement streams). By using

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[5] As the dissenting arbitrator, Professor Hans Smit of Columbia University, stated, the 10.446% discount rate "barely exceeds the interest rate on prime debentures and fails to take into account that a return on an investment in a country like Turkmenistan would, under prevailing market conditions, require a far higher rate of return." RE8 at 4559.

the rate applicable only to the less risky stream to discount the higher-risk, lower-priority, and far-longer duration revenue stream, the arbitrators inflated present value by some $200 million. Therein lies the legally impermissible contradiction that the arbitrators refused to acknowledge and that the court of appeals overlooked. As in *Hardy,* 341 F.3d at 132, the arbitrators "crossed the line from confusion to inexplicability."

In addition, the joint venture agreement (art. 24.4(H)) expressly provided that "consequential, punitive or other similar damages shall not be allowed." RE12 at 6339. The arbitrators' inapplicable discount rate violated this contractual limitation by inflating damages "beyond mere compensation of the claimant." 1 CHITTY ON CONTRACTS, *supra* p. 16, § 27-017. That alone would authorize vacatur under the manifest disregard standard as applied by other circuits. See *Missouri River*, 267 F.3d at 855 (vacating award where arbitrators disregarded contractual limitation on damages); *Wonderland Greyhound Park*, 274 F.3d at 36. The Fifth Circuit's less flexible standard prevented it from reaching that result.

B. The Arbitrators Consciously Disregarded The Governing Law.

This case is an ideal vehicle to clarify the manifest disregard of law standard because the record reveals that the arbitrators' selection of a grossly inadequate discount rate was not simply a mistake but the result of a conscious decision not to apply the law.

The circumstances by which the arbitrators selected and then refused to correct the plainly inapplicable discount rate demonstrate that they were aware of their error and its consequences and strongly suggest that they were motivated by factors other than the merits of the issue. As described above (pp. 3-4), the arbitrators announced their decision to discount respondents' lost joint venture income by the FPC

loan rate in an advisory opinion issued before respondents opted to terminate the contract. The arbitrators had heard no expert or other testimony supporting the rate they selected. Before petitioner had an opportunity to demonstrate the defects in the advisory rate, respondents had accepted the arbitrators' invitation to rely on their advisory ruling by accepting termination of the contract. Respondents thereafter insisted that their reliance on the arbitrators' advisory ruling precluded any change to the provisional discount rate. RE15 at 1223; RE23.

Despite undisputed evidence that a discount rate in the range of 19.1% was appropriate and represented a fair market value rate of return (see *supra* p. 5), and despite petitioner's repeated showings that applying the FPC rate to the overall project revenues was logically inconsistent and legally impermissible, the majority arbitrators refused to acknowledge, much less correct, that contradiction. Instead, they merely asserted that they had considered all risks and selected a rate higher than respondents' and lower than petitioner's proposals, with no explanation as to how the FPC rate could be appropriate or even conceivable. RE7 at 4590-94. After petitioner requested correction of this plain error, the arbitrators again refused to address the contradiction, instead pronouncing that "[t]he resulting rate was and remains their judgment of the rate that is appropriate in the circumstances of this case." RE9 at 5231.

The majority arbitrators plainly felt boxed in by their initial "guidance" after successfully inducing respondents to rely on their advice. Instead of correcting the discount rate, they tried to deflect attention from the inherent contradiction in their award by rote references to "judgment" and "estimates" and "considerations of positions." RE9 at 5233. These obfuscating phrases, plainly designed to insulate their award from review, cannot overcome the lack of any explanation of how the interest rate for the short-term and relatively secure FPC loan repayments could possibly be

appropriate to discount the long-term and risky overall project revenues to present value. The arbitrators' evasion of this central contradiction, after petitioner twice brought it to their attention, compels the conclusion that they were aware of and consciously disregarded their legal error. As in *Halligan*, 148 F.3d at 204, the arbitrators' failure to explain why the selected discount rate applied to the particular income stream at issue—indeed, their inability to do so without "strain[ing] credulity" (*ibid.*)—confirms that their disregard of the law was manifest.

In sum, this case dramatically demonstrates that the risk of rogue arbitration awards is real. The arbitrators' desire to avoid admitting a procedural blunder—which permitted Bridas to lock in an advisory discount rate that could not be justified on the merits—resulted in the imposition of damages more than $200 million above actual damages on the national oil company of a young nation of only five million people struggling to emerge from the shadow of the Soviet Union. If the manifest disregard standard of review is to be meaningful, this case must fall within the narrow class of arbitral awards that cannot be allowed to stand. This case should be remanded for application of the proper manifest review of law standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20929

Bridas S.A.P.I.C.; Bridas Energy International, Ltd.; Intercontinental Oil & Gas Ventures, Ltd.; Bridas Corporation, Plaintiffs-Appellees,

v.

Government of Turkmenistan; et al., Defendants, Government of Turkmenistan; State Concern Turkmenneft, Defendants-Appellants.

September 9, 2003

Before DAVIS and BENAVIDES, Circuit Judges, and RESTANI*, Judge

BENAVIDES, Circuit Judge:

I.

Plaintiffs-appellees, Bridas S.A.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil & Gas Ventures, Ltd., and Bridas Corporation (collectively, "Bridas") originally brought this action to confirm an international arbitration

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* Judge, U.S. Court of International Trade, sitting by designation.

award rendered in Bridas's favor against Defendants-appellants, Government of Turkmenistan ("the Government" or "Turkmenistan"), Concern Balkannebitgaz-Senegat, and State Concern Turkmenneft (collectively "Turkmenneft").

Bridas, an Argentinian corporation, entered into a joint venture agreement ("JVA" or "the agreement") on February 10, 1993, with a production association, Turkmenneft, formed and owned by the Government at the time that the JVA was signed. The Government itself was not a signatory to the agreement. The JVA designated Bridas as the "Foreign Party," and Turkmenneft as the "Turkmenian Party." Over time, the Government substituted various other entities to serve as the Turkmenian Party, ultimately resting with State Concern Turkmenneft and Concern Balkannebitgaz-Senegat (collectively, "Turkmenneft").

The JVA created a joint venture entity called Joint Venture Keimir ("JVK"). JVK was established "for the purpose of conducting hydrocarbon operations in an area in southwestern Turkmenistan, known generally as Keimir." The relevant part of Article XXIV of the agreement stipulates that "[a]ny dispute, controversy or claim arising out of or in relation to or in connection with th[e] [a]greement . . . shall be exclusively and finally settled by arbitration, and any Party may submit such a dispute, controversy or claim to arbitration." The parties further agreed that any arbitration would be "conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce as amended from time to time." The law governing the interpretation of the agreement was to be the law of England.

Bridas claims that in November 1995, the Government "ordered Bridas to suspend further work in Keimir, and prohibited Bridas from making imports and exports in or from Turkmenistan." Consequently, on April 16, 1996,

Bridas initiated an arbitration proceeding against Appellants with the International Chamber of Commerce ("ICC").

On June 21, 1996, Turkmenistan argued to the ICC Court of Arbitration that it was not a proper party to the arbitration because, among other reasons, it did not sign the JVA and was thus not a party to the arbitration clause contained within it. The ICC Court subsequently confirmed by letter that the arbitrators themselves would determine whether the Government was subject to their jurisdiction. The dispute was subsequently referred to a three-person tribunal. Although the arbitration agreement contemplated that the arbitration proceeding would be held in Stockholm, Sweden, the parties instead agreed to arbitration proceedings in Houston, Texas.

The arbitral proceedings, which began in January 1997, involved 19 days of hearings, various expert reports, testimony concerning damages, and extensive legal briefing. On June 25, 1999, a two-person majority of the Tribunal issued its First Partial Award ("FPA"). The FPA held that (1) the arbitrators had jurisdiction to determine whether they had jurisdiction over the Government, and (2) that "the Government [was] a proper party to the arbitration." The Tribunal also ruled that Appellants had repudiated the JVA. The FPA stated:

> [I]f [Bridas] were to accept repudiatory conduct by the [Defendants] and [Turkmenistan] and thus to bring the [joint venture] [a]greement to an end, their damages would be calculated on a loss-of-bargain basis, involving 218,560,935 barrels of oil equivalent at a net-back price of $10.50 per barrel, using a discount rate of 10.446% based on a contract term of 25 years.

In a letter dated July 5, 1999, Bridas formally accepted the Defendant's repudiation of the JVA.

On October 21, 1999, the arbitrators issued their Second Partial Award ("SPA"). In its SPA, the same two-person majority held that the Tribunal had "the jurisdiction to consider and make an award concerning [Bridas's] claim for damages arising out of their acceptance of the repudiatory conduct of the [appellants]."

The Third Partial Award ("TPA") was rendered on September 2, 2000. In the TPA, the same two-person majority clarified its previous rulings in the FPA and calculated damages for Bridas. The majority held that the 10.446% discount rate was the appropriate rate for calculating damages because "[i]t was higher than the non-risk [7.5%] discount factor advanced initially by [Bridas] and takes into account the various risk referred to by the parties in the evidence." The Tribunal then awarded a grand total of $495,000,000 in damages to Bridas. The Final Award was issued on January 26, 2001.

Bridas initiated this lawsuit on July 7, 1999, when it filed its application for confirmation of the FPA.[1] The Government and Turkmenneft, in response, filed motions to dismiss the application for confirmation and to vacate and refuse confirmation of the FPA. On December 22, 2000, Turkmenneft, conditionally joined by the Government, moved to vacate or modify both the TPA and the Final Award.

The district court denied Appellants' motions to vacate or modify the FPA, TPA, and the Final Award.[2] The

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[1] Bridas subsequently withdrew its motion to confirm the FPA.

[2] Bridas withdrew its motion to confirm the FPA in February 2000. Appellants' motions to dismiss the application for confirmation thus became moot. The only motions that remained before the district court, therefore, were Appellants' motions to vacate or modify the FPA, TPA, and Final Award. The district court, therefore, erred in ordering "the arbitration awards in the case . . . CONFIRMED."

Government and Turkmenneft appealed the district court's judgment to this court.

Appellants ask us to resolve the following issues on appeal: (1) whether the Tribunal had jurisdiction over the Government; (2) whether the arbitral majority's rulings on the merits were in manifest disregard of the law; and (3) whether the arbitral majority exceeded its authority in calculating the damage award.

II.

United States federal courts have jurisdiction to hear this case under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. We have jurisdiction to hear this appeal under § 16(a)(3) of the Act. 9 U.S.C. § 16(a)(3) et seq. (permitting appeal of "a final decision with respect to an arbitration that is subject to this title.").

A.

The first issue we address is whether the Tribunal properly exercised jurisdiction over the Government. In reviewing a district court's refusal to vacate an arbitration award on the ground that one of the parties never agreed to arbitrate the dispute, the district court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed *de novo*. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995). The district court's interpretation of the arbitration agreement, and whether it bound the parties to arbitrate, is a question of law. *R.M. Perez & Assoc., Inc. v. Welch*, 960 F.2d 534, 537 (5th Cir. 1992). *See MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 946 (11th Cir. 1999) (noting that a district court's denial of a petition to compel arbitration on the ground that a party was not a signatory to the contract is reviewed *de novo*); *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1513 (10th Cir. 1995) (same). The factual findings upon which such a determination is based are, of course, subject to

review only for clear error. *MAG Portfolio Consultant, GMBH v. Merlin Biomed Group, LLC*, 268 F.3d 58, 61 (2d Cir. 2001). The parties agree that federal common law governs the determination of this issue.

B.

In order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause.[3] Even though the Government did not sign the JVA, the Tribunal held that the Government was bound to arbitrate the dispute with Bridas because (1) the Government had not taken any steps to extricate itself from the proceedings and (2) its evaluation of the evidence revealed at least 22 commitments in the JVA "that only the Government could give or fulfill."

The district court, because it did not find "clear and unmistakable" evidence that the parties agreed that the Tribunal would determine its own jurisdiction, undertook an independent review of whether the Government was bound to arbitrate with Bridas. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-47 (1995). *Accord AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986). Whether a party is bound by an arbitration agreement is generally considered an issue for the courts, not the arbitrator, "[u]nless the parties clearly and unmistakably

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[3] *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002) (holding that arbitration agreements "must be in writing and signed by the part[ies]" and may apply to nonsignatories only "in rare circumstances"). *Accord Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (noting that "arbitration is a matter of contract and cannot, in general, be required for a matter involving an arbitration agreement nonsignatory"). *Cf. EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion"); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so.").

provide otherwise."[4] *AT&T Tech.*, 475 U.S. at 649. The district court concluded that despite the Government's non-signatory status, principles of agency and equitable estoppel bound the Government to the JVA.

C.

As a preliminary matter, we will address Bridas's assertion that the Government waived its right to contest the Tribunal's jurisdiction because: (1) it failed to challenge the Tribunal's Order No. 5; and (2) it voluntarily took part in the arbitration through Turkmenneft.

Both of these arguments are meritless. Under § 172.082(f) of the Texas International Arbitration Act ("TIAA"), Tex. Civ. Prac. & Rem. Code § 172.082(f) (Vernon 1997 & Supp. 2003), if a tribunal makes a preliminary ruling *that it has jurisdiction* (not that it has jurisdiction to determine jurisdiction), a party waives any objection to the ruling, unless it requests the district court of the county in which the arbitration is taking place to decide the matter. Tex. Civ. Prac. & Rem. Code § 172.082(f).

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[4] This independent review of whether the arbitration panel had jurisdiction over the Government represents a departure from the typically deferential review afforded arbitral decisions pursuant to the federal policy favoring arbitration. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). The presumption in favor of arbitration concerning the scope of arbitrable issues is not applicable to the question of who should decide arbitrability, because the purpose of the FAA was to make arbitration agreements as enforceable as other contracts, not more so. *Id.*; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). *See PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 514 (3d Cir. 1990) (stating it is "per se irreparable harm if a court were to abdicate its responsibilities to determine the scope of an arbitrator's jurisdiction and, instead, were to compel a party who has not agreed to do so, to submit to an arbitrator's own determination of his authority."); *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) (noting that ordinary contract principles, rather than the federal policy favoring arbitration, apply to the determination of whether there is a valid agreement to arbitrate).

Order No. 5 states: "[w]e have not yet decided whether the Government is bound by the commitment to arbitrate." The order, thus, did not address whether the Tribunal had jurisdiction over the Government. § 172.082(f) of the TIAA is therefore inapplicable.

Second, while it is rare that we are asked to decide a jurisdictional issue such as this one after the proceedings have concluded, neither the fact that the Government "allowed the proceeding to continue" over its objection, nor its "virtual representation" at the arbitration by Turkmenneft, waive its right to dispute the Tribunal's jurisdiction in court. See, e.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 946-47 (1995). The cases cited by Bridas to the contrary are inapposite.

D.

We begin our review by considering the terms of the JVA. Who is actually bound by an arbitration agreement is a function of the intent of the parties, as expressed in the terms of the agreement. *See Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (noting that whether a party is obligated to arbitrate is a matter of contract); *Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 95 (2d Cir. 1999) (noting that whether an entity is a party to the arbitration agreement is included within the broader issue of whether the parties agreed to arbitrate); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) (noting that federal common law "dovetails precisely with general principles of contract law," and "the judicial task in construing a contract is to give effect to the mutual intentions of the parties") (quoting *NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 681 (D.C. Cir. 1985)).

It is apparent that the four corners of the agreement do not bind the Government to arbitrate this dispute. The Government did not sign the JVA, nor was it defined as a

party in the agreement. The agreement describes the framework for the relationship between two parties: the "Foreign Party," defined as Bridas, and the "Turkmenian Party," defined as Turkmenneft. Considering that the purpose of the joint venture was to develop the hydrocarbon resources of a nation whose economy and land is dominated by the Government, the Government itself is not mentioned frequently in the agreement.[5] Corporations commonly elect to establish "liability insulating entities" to enter into particular types of transactions, and the structure of the JVA indicates that this was exactly what the Government intended to do with respect to the JVA. *See Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002). The agreement itself does not signal an intention to bind the Government to its terms, and thus to arbitrate this dispute.

E.

Nevertheless, federal courts have held that so long as there is some written agreement to arbitrate, a third party may be bound to submit to arbitration. Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party—Who is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*,

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[5] *Article 3.29* defines "[r]egistration" as "the official registration of the Joint Venture as a legal entity by the government of Turkmenistan." *Article 11.8* provides for the government to receive its royalties from the hydrocarbon production in-kind, subject to the agreement of the parties, and *Article 11.9* permits JVK to exchange its product for product produced by Government-owned refineries. *Article 22.3* states, "Interests, rights and obligations of Turkmenistan, as represented by Turkmenian Party, and interest, rights and obligations of the Foreign Party under this Agreement, shall be solely governed by the provisions of this Agreement which may be altered or amended only by the mutual written agreement of the Parties to this Agreement. . . ." *Article 27.5* permits JVK to rent property from the Government that may be reasonably necessary for its operations.

34 Geo. Wash. Int'l L. Rev. 711, 720 (2003).[6] Ordinary principles of contract and agency law may be called upon to bind a nonsignatory to an agreement whose terms have not clearly done so. *See E.I. DuPont de Nemours & Co. v. Rhone Poulenc*, 269 F.3d 187 (3d Cir. 2001); *Thomson-C.S.F., S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). Six theories for binding a nonsignatory to an arbitration agreement have been recognized: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary. *Thomson-C.S.F., S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *DuPont*, 269 F.3d at 195-97 (3d Cir. 2001). *Accord Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 629 (6th Cir. 2003). Bridas has waived arguments premised upon assumption and incorporation by reference.[7] We address the remaining four theories in turn.

1. Agency

The district court held that the Government was bound to arbitrate the dispute with Bridas because Turkmenneft signed the JVA as an agent of the Government. The parties dispute

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[6] *See International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000); *Thomson-C.S.F., S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Alamria v. Telcor Int'l, Inc.*, 920 F. Supp. 658, 669 (D. Md. 1996)(finding "there is no strict requirement that only signatories to an agreement be susceptible to compelled arbitration").

[7] Bridas did not appeal the district court's holding that Turkmenistan did not assume the obligation to arbitrate. Bridas attempted to appeal, in a footnote, the district court's determination that there was no separate contractual agreement to incorporate by reference into the JVA. Arguments that are insufficiently addressed in the body of the brief, however, are waived. *See Quick Techs., Inc. v. Sage Group PLC*, 313 F.3d 338, 343 n.3 (5th Cir. 2002); *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived").

whether a finding that the Government is bound to the JVA by principles of agency is a matter of law, subject to plenary review, or a finding of fact that is reviewed merely for clear error. The Second Circuit has held that "[a]gency is a legal concept." *Interocean Shipping Co. v. Nat'l Shipping & Trading*, 523 F.2d 527, 537 (2d Cir. 1975); *Accord American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999). This court, however, appears to view the decision as a mixed question of law and fact, dominated by factual determinations and thus subject to review only for clear error. *See American Intern. Trading Corp. v. Petroleos Mexicanos*, 835 F.2d 536, 539 (5th Cir. 1987); *George v. C.I.R.*, 803 F.2d 144, 147 n.2 (5th Cir. 1986), *vacated* by 485 U.S. 973 (1988) (vacated on independent grounds). *See 3* Am.Jur.2d Agency § 19 (2002) (noting that existence of agency is a question of fact). We need not decide this question because the district court's holding that Turkmenneft is an agent of the Government does not withstand our review, regardless of the standard applied.

Turkmenneft is entitled to a "presumption of independent status." *Hester International Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989). Bridas, therefore, carried the burden of proving that Turkmenneft signed the JVA as an agent of the Government. *Id.*; *Hofherr v. Dart Indust., Inc.*; 853 F.2d 259 (4th Cir. 1988). Agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1958). An agency relationship may be demonstrated by "written or spoken words or conduct, by the principal, communicated either to the agent (actual authority) or to the third party (apparent authority)." *Hester*, 879 F.2d at 181. *See Arriba Limited v. Petroleos Mexicanos*, 962 F.2d 528, 536 (5th Cir. 1992). If Turkmenneft indeed signed the JVA in its capacity as the Government's agent, the Government would be bound

by the JVA's arbitration requirement. *See Srivastava v. C.I.R.*, 220 F.3d 353, 369 (5th Cir. 2000).

The district court primarily relied upon three pieces of evidence to support its determination that Turkmenneft signed the JVA as the Government's agent. First, it pointed to a letter from Mr. Suyunov, Deputy Chairman of the Council of Ministers of Turkmenistan, and Mr. Ishanov, Chairman of the Turkmenian Party, that confirmed, during negotiation of the JVA, that "all Joint Venture Keimir rights . . . established in the organization documents are fully and completely guaranteed by the Government, and there is no additional need for any further decisions, decrees, or approvals."[8] Second, the district court referred to Article 22.3 of the JVA which states that the "[i]nterests, rights and obligation of Turkmenistan" are represented by the Turkmenian Party. *See supra* note 6. Third, the district court relied upon a statement made in a 1996 letter by the Government's Ministry of Oil and Gas to the director general of JVK and JVY (another joint venture with Bridas), that "the Ministry is the Turkmenian Party."[9]

Given the language and structure of the JVA, these evidentiary findings are insufficient to support an agency determination. First, typically a guarantor cannot be compelled to arbitrate on the basis of an arbitration clause in a contract to which it is not a party. *Interocean Shipping Co.*

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[8] To the extent that the district court implied that the contents of this letter were contained within the JVA, it clearly erred.

[9] The letter from the Ministry was addressed to Mr. Schreiterer, the Director General of both JVK and JVY, in reference to both of the joint ventures. The district court distorted the meaning of the statement that "the Ministry is the Turkmenian Party" by inserting a reference in the middle of the quoted statement to JVK. In reality, the statement could easily have been in reference to JVY, not JVK. The district court, however, chose to interpret the statement as referring to JVK, and in the absence of firmer evidence to the contrary, we accept its interpretation.

v. Nat'l Shipping & Trading Co., 523 F.2d 527, 539 (2d Cir. 1975). *Accord Hester*, 879 F.2d at 176, 180-81 (holding that an instrumentality of Nigeria was not the government's agent for purposes of an agreement between the instrumentality and an American corporation despite a guarantee by the Nigerian government for all loans necessary for offshore financing). Second, a statement of representation, such as that in Article 22.3, in the midst of a provision regarding oral modifications of the agreement, is not remarkable. "All corporations to some degree represent their owners," and Turkmenneft is an oil company wholly owned by Turkmenistan. *Hester Intern. Corp v. Federal Republic of Nigeria*, 879 F.2d 170, 180 (5th Cir. 1989). As we have held in the past, such a statement does not establish an agency relationship. *Id.* at 180. And third, the 1996 letter from the Ministry, while probative of how the Government conceived of its role in JVK in 1996, does not overcome the fact that the preamble to the JVA defines the Turkmenian Party as Turkmenneft—a "legal entity within the meaning of the laws of Turkmenistan"—not the Government or the Ministry. The JVA was signed in 1993, before the Ministry penned the letter that Bridas claims demonstrates that Turkmenneft signed the JVA as an agent.

Arbitration agreements apply to nonsignatories only in rare circumstances. *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002).[10] We are simply unable to conclude that the parties, one a multi-national corporation who has negotiated joint venture agreements in the past, and the other,

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[10] The Government argues that *Westmoreland* does not permit us to use agency principles to bind a nonsignatory to an arbitration agreement. The Government reads *Westmoreland* too broadly. There, we held that a nonsignatory could not compel arbitration merely because he was an agent of one of the signatories. 299 F.3d at 466. This is a distinctly different question from whether a signatory may compel the principal of a signatory agent to arbitrate under an agreement that the agent signed as an authorized representative of the principal. *Westmoreland*, therefore, does not bar us from considering this claim.

a sovereign nation, both represented by able counsel, intended Turkmenneft to sign the JVA as an agent of the Government in the absence of clearer language to that effect.

> The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and, like a railroad crossing, suggests the duty to stop, look, and listen, and he who would bind the principal is bound to ascertain, not only the fact of agency, but the nature and extent of the authority[.]

Standard Acc. Ins. Co. v. Simpson, 64 F.2d 583, 589 (4th Cir. 1933). *Accord Racicky v. Farmland Indus. Inc.*, 328 F.3d 389, 393 (8th Cir. 2003). Had Bridas truly felt that Turkmenneft was signing the agreement not for itself but on behalf of the Government, it had the obligation to make that fact clear on the face of the agreement. This could have been accomplished in a myriad of ways. Bridas could have requested that the Government sign the agreement, or inserted a prominent and direct statement as to Turkmenneft's status. Bridas has not presented any evidence that would permit us to excuse such an oversight. Bridas was doubtlessly well aware of the risks inherent in investing in countries of the former Soviet Union in 1993, and the possibility that its investment would be swept away in political turmoil. We will not bind the Government to the agreement, simply because Bridas lost a gamble that it was willing to take. To do otherwise would vitiate the predictability of the legal backdrop against which the parties voluntarily agreed to do business. *See Westmoreland*, 299 F.3d at 467.

Bridas has set forth ample evidence regarding the extent to which Turkmenneft was controlled by the Government *subsequent* to the signing of the JVA. Such evidence, however, does not establish that Turkmenneft had the apparent authority to bind the Government in 1993. Bridas

did not satisfy its burden in this regard, and the district court's holding that Turkmenneft signed the JVA as an agent of the Government was clearly erroneous.

2. Alter Ego

Courts occasionally apply the alter ego doctrine and agency principles as if they were interchangeable. *See House of Koscot Dev't Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64 (5th Cir. 1972). The two theories are, however, distinct. Under the alter ego doctrine, a corporation may be bound by an agreement entered into by its subsidiary regardless of the agreement's structure or the subsidiary's attempts to bind itself alone to its terms, "when their conduct demonstrates a virtual abandonment of separateness." *Thomson-C.S.F.*, 64 F.3d at 777. This is due to the doctrine's strong link to equity. See *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992). *Accord McCarthy v. Azure*, 22 F.3d 351, 362-63 (1st Cir. 1994) (holding that the alter ego doctrine can be invoked "only where equity requires the action to assist a third party"). The laws of agency, in contrast, are not equitable in nature, but contractual, and do not necessarily bend in favor of justice. Courts are thus comparatively free from the moorings of the parties' agreements when considering whether an alter ego finding is warranted.

This is not to say that the decision to apply the alter ego doctrine to bind a parent is made routinely. "Courts do not lightly pierce the corporate veil even in deference to the strong policy favoring arbitration." *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1461 (10th Cir. 1995). The corporate veil may be pierced to hold an alter ego liable for the commitments of its instrumentality only if (1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil. *American Fuel Corp. v. Utah Energy Dev't*

Co., Inc., 122 F.3d 130, 134 (2d Cir. 1997). *Accord First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629-30 (1983); *Gardemal v. Westin Hotel Co.*, 186 F.3d 588 (5th Cir. 1999). *Cf. Matter of Sims*, 994 F.2d 210 (5th Cir. 1993) (holding that an element of fraud must be present before courts will pierce the corporate veil in a case based upon a contract).

The district court held, in a brief paragraph, that the Government was not the alter ego of Turkmenneft. After finding that the evidence reveals that Turkmenneft was controlled by the Government, the court stated,

> [d]espite this control . . . Bridas has not offered evidence proving "an absence of corporate formalities." Moreover, there is no indication of "an intermingling of corporate finances and directorship" between Turkmenneft and the government. Thus, Turkmenistan cannot be bound under an alter ego theory.

Alter ego determinations are reviewed in this circuit only for clear error. *Zahra Spiritual Trust v. U.S.*, 910 F.2d 240, 242 (5th Cir. 1990). Errors of law, however, are not entitled to deference. *W.H. Scott Const. Co., Inc. v. City of Jackson*, 199 F.3d 206, 219 (5th Cir. 1999). *Accord United States v. Delgado-Nunez*, 295 F.3d 494, 496 (5th Cir. 2002) (noting that a mistake of law is, by definition, an abuse of discretion); *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (same).

The district court erred in premising its conclusion solely upon the existence of corporate formalities and an absence of commingling of funds and directors. Alter ego determinations are highly fact-based, and require considering the totality of the circumstances in which the instrumentality functions. *Estate of Lisle v. C.I.R.*, 341 F.3d 364, 375-76 (5th Cir. 2003). No single factor is determinative. This should be apparent from the extensive list of circumstances

that courts have developed to guide alter ego determinations. *See id.*; *Markow v. Alcock*, 356 F.2d 194, 197-98 (5th Cir. 1966); *American Fuel Corp.*, 122 F.3d at 134; *MAG Portfolio Consultant, GMBH v. Merlin Biomed. Group LLC*, 268 F.3d 58, 63 (2d Cir. 2001). Because the district court failed to take into account all of the aspects of the relationship between the Government and Turkmenneft, it committed an error of law and must reconsider the issue on remand.[11]

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[11] Once it has been determined that the corporate form was used to effect fraud or another wrong upon a third-party, alter ego determinations revolve around issues of control and use. *See Estate of Lisle*, 341 F.3d at 368 (5th Cir. 2003). On remand, the court should explore the totality of the environment in which Turkmenneft operated, including those factors normally explored in the context of parent-subsidiary alter ego claims, such as whether:

> (1) the parent and subsidiary have common stock ownership; (2) the parent and subsidiary have common directors or officers; (3) the parent and subsidiary have common business departments; (4) the parent and subsidiary file consolidated financial statements; (5) the parent finances the subsidiary; (6) the parent caused the incorporation of the subsidiary; (7) the subsidiary operated with grossly inadequate capital; (8) the parent pays salaries and other expenses of subsidiary; (9) the subsidiary receives no business except that given by the parent; (10) the parent uses the subsidiary's property as its own; (11) the daily operations of the two corporations are not kept separate; (12) the subsidiary does not observe corporate formalities.

Id. at 375 n.16 (citing *Oxford Capital Corp. v. United States*, 211 F.3d 280, 284 n.2 (5th Cir. 2000)). Additional factors include: (1) whether the directors of the "subsidiary" act in the primary and independent interest of the "parent"; (2) whether others pay or guarantee debts of the dominated corporation; and (3) whether the alleged dominator deals with the dominated corporation at arms length. *Markow*, 356 F.2d at 197-98; *American Fuel Corp.*, 122 F.3d at 134.

While the preceding considerations are adaptable to a certain degree to the context of a sovereign government and its instrumentality, the district court should also consider the factors that we take into account

3. Estoppel

The use of equitable estoppel is within a district court's discretion. *Grigson*, 210 F.3d at 528; *Hill v. G.E. Power Systems, Inc.*, 282 F.3d 343, 348 (5th Cir. 2002). We, therefore, review the district court's decision to apply equitable estoppel only to ensure that the court did not abuse its discretion. *Id.* "To constitute an abuse of discretion, the district court's decision must be either premised on an application of the law that is erroneous, or on an assessment of the evidence that is clearly erroneous." *Id.*

The district court, relying on *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000), held that a nonsignatory may be equitably estopped from asserting that it is not bound by an arbitration agreement when the signatory raises allegations of substantially interdependent and concerted misconduct against both a nonsignatory and one or more of the signatories to the contract.

As the Government correctly points out, the district court misapplied the "intertwined claims" theory of equitable estoppel. *Grigson* does not stand for the proposition stated by the district court. In *Grigson*, we estopped a signatory plaintiff from relying upon the defendants' status as a

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when determining if a state agency is the "alter ego" of a state for 11th amendment sovereign immunity purposes:

> 1) whether state statutes and case law view the entity as an arm of the state; (2) the source of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Perez v. Region 20 Educ. Service Center, 307 F.3d 318, 326-27 (5th Cir. 2002). *Accord Vogt v. Bd. of Com'rs of Orleans Levee Dist.*, 294 F.3d 684, 688-89 (5th Cir. 2002).

nonsignatory to prevent the defendants from compelling arbitration under the agreement. 210 F.3d at 526-28. We justified applying equitable estoppel in *Grigson* in part because to do otherwise would permit the signatory plaintiff to "have it both ways." *Id.* at 528. *See Hill*, 282 F.3d at 349 (5th Cir. 2002). "[The plaintiff] cannot, on the one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a nonsignatory." *Grigson*, 210 F.3d at 528.[12]

The rationale of *Grigson* does not apply to the circumstances of this case. Here, the Government, unlike the estopped party in *Grigson*, did not sign a contract containing an arbitration provision and never sued Bridas on the agreement. The distinction is not one without a difference. *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, S.A.S., 269 F.3d 187, 202 (3d Cir. 2001). The Second Circuit has expressly stated that the Grigson version of estoppel applies only to prevent "a *signatory* from avoiding arbitration with a nonsignatory when the issues the *nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.*" Thomson-CSF, S.A., 64 F.3d at 779 (emphasis added). "[B]ecause arbitration is guided by contract principles, the reverse is not also true: a signatory may not estop a nonsignatory from avoiding arbitration regardless of how closely affiliated that nonsignatory is with

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[12] *Grigson*, and the 11th Circuit decision that it relied upon, have been referred to as misguided deviations from traditional estoppel theories. *See* J. Douglas Uloth & J. Hamilton Rial, III, Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?, 21 Rev. Litig. 593, 603-04 (2002). *See also Grigson*, 210 F.3d at 531 (Dennis, J., dissenting) ("[N]early anything can be called estoppel. When a lawyer or a judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel.").

another signing party." *MAG Portfolio Consult, GMBH*, 268 F.3d at 62. The Third Circuit reached the same conclusion in *DuPont*, 269 F.3d at 202.

As the Government correctly notes, the result in *Grigson* and similar cases makes sense because the parties resisting arbitration had expressly agreed to arbitrate claims of the very type that they asserted against the nonsignatory. *See* J. Douglas Uloth & J. Hamilton Rial, III, Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?, 21 Rev. Litig. 593, 633 (2002). "It is more foreseeable, and thus more reasonable, that a party who has actually agreed in writing to arbitrate claims with someone might be compelled to broaden the scope of his agreement to include others." *Id.* The simple fact that *Bridas's* claims against Turkmenneft and the Government are inextricably intertwined (a finding of the district court which is not clearly erroneous) is insufficient, standing alone, to justify the application of equitable estoppel to the *Government's* assertion that it is not subject to the Tribunal's jurisdiction. Were this to become the case, this expanded version of equitable estoppel would "threaten to overwhelm the fundamental premise that a party cannot be compelled to arbitrate a matter without its agreement." *Id.* at 632. The district court thus abused its discretion in applying the intertwined claims theory of equitable estoppel to this case.

Bridas, however, contends that the district court's decision may nonetheless be affirmed on the basis of the "direct benefits" version of estoppel.[13] Direct benefits

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[13] *See DuPont*, 269 F.3d at 195 (3d Cir. 2001); *American Bureau of Shipping v. Tencara Shipyard S.P.A*, 170 F.3d 349, 351-53 (2d Cir. 1999); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1062-64 (2d Cir. 1993); *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976); *Westmoreland*, 299 F.3d at 467.

estoppel applies when a nonsignatory "knowingly exploits the agreement containing the arbitration clause." *DuPont*, 269 F.3d at 199. *See Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993) (holding that non-signatory local affiliate, who used a trade name pursuant to an agreement that it ratified which contained an arbitration clause, was estopped from relying on its nonsignatory status to avoid arbitrating under the agreement); *American Bureau of Shipping v. Tencara Shipyard S.P.A.* 170 F.3d 349, 353 (2d Cir. 1999) (binding non-signatory to a contract under which it received direct benefits of lower insurance and the ability to sail under the French flag).

There is an important distinction, however, between cases where the courts seriously consider applying direct benefits estoppel, and the case at bar. In the former, the nonsignatory had brought suit against a signatory premised in part upon the agreement. *See, e.g., DuPont*, 269 F.3d at 199; *Deloitte*, 9 F.3d at 1064; *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000); *Tencara*, 170 F.3d at 351. Here, it is undisputed that the Government has not sued Bridas under the agreement. The Government has thus not "exploited" the JVA to the degree that the cases that consider applying this version of estoppel require.

4. Third-Party Beneficiary

Nor is the third-party beneficiary doctrine availing. While very similar to estoppel, the third-party beneficiary doctrine is distinct:

> Under third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed. Thus, the snapshot this Court examines under equitable estoppel is much

later in time than the snapshot for third party beneficiary analysis.

DuPont, 269 F.3d at 200 n.7. It is not enough, therefore, that the Government benefited from the existence of the JVA. "[T]he fact that a person is directly affected by the parties' conduct, or that he may have a substantial interest in a contract's enforcement, does not make him a third-party beneficiary." *Id. See DuPont*, 269 F.3d at 196-97 (noting the fact that a parent derived benefits from a contract executed by its subsidiary is insufficient to make it a third-party beneficiary).

Parties are presumed to be contracting for themselves only. *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1075-76 (5th Cir. 2002). This presumption may be overcome only if the intent to make someone a third-party beneficiary is "clearly written or evidenced in the contract." *Id. Accord McCarthy v. Azure*, 22 F.3d 351, 362 (1st Cir. 1994) ("[t]he crux in third-party beneficiary analysis . . . is the intent of the parties.").

For the same reasons given *supra*, the JVA simply does not evince the requisite clear intent to benefit the Government, other than to the degree ordinarily expected when an instrumentality of a sovereign enters into a contract to develop the country's natural resources. The JVA's integration clause, moreover, specifies that the terms of the agreement apply only to the parties, defined as the Turkmenian Party (i.e. Turkmenneft) and Bridas. *See, e.g., Lester v. Basner*, 676 F. Supp. 481, 484-85 (S.D.N.Y. 1987) (refusing to find a third-party beneficiary relationship generating an obligation to arbitrate where the contract itself "is silent as to whether [its] terms" apply to the purported third-party beneficiaries). Furthermore, we are again reluctant to bind the Government to the terms of the JVA on a third-party beneficiary theory because the Government has never filed a claim against Bridas premised upon the

agreement, or otherwise sought to enforce its terms. *See, e.g., DuPont*, 269 F.3d at 192; *Industrial Electronics Corp. of Wisconsin v. iPower Distribution Group, Inc.*, 215 F.3d 677 (7th Cir. 2000); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990). Bridas has not brought to our attention a case where a third-party beneficiary has been bound to arbitrate a dispute, arising under an agreement to which it is not a party, that the third-party itself did not initiate in court. We decline to do so for the first time today.

III.

The next question presented in this appeal is whether the district court erred in upholding the Tribunal's award of damages in the TPA for breach of contract. This circuit recognizes the venerable rule announced by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), in which it was held that only a "manifest disregard of the law" warrants vacating an arbitration award. *Prestige Ford v. Ford Dealer Computer Services, Inc.*, 324 F.3d 391, 395 (5th Cir. 2003). In *Prestige Ford*, we expounded the deferential standard first articulated in Wilko:

> [m]anifest disregard clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it. To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The

> governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable.

Id. (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986)).

To determine whether the Supreme Court's "manifest disregard of the law" standard has been satisfied, we apply a two-prong inquiry (the "manifest-disregard test"). *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 762 (5th Cir. 1999). We held in *Williams* that

> [f]irst, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld. Second, where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between the parties.

Id. See also Harris v. Parker College of Chiropractic, 286 F.3d 790, 792 n.1 (5th Cir. 2002) (applying the manifest-disregard test articulated in Williams). Furthermore, it is settled in this circuit that this "extraordinarily narrow"[14] standard of review applies to claims brought pursuant to the FAA, such as the instant matter. *Id.* at 761; *Williams*, 197 F.3d at 759.

The district court's refusal to vacate or modify the arbitration award is reviewed under the same standard as any other district court decision, with findings of fact that are not

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[14] *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1995). *See also Harris*, 286 F.3d at 792.

clearly erroneous accepted and questions of law considered *de novo*. *Id.* We thus review *de novo* the district court's application of the manifest-disregard test. We now confront the first prong of the manifest-disregard test and address whether the arbitration panel applied the appropriate discount rate to convert projected lost revenues to present value. As an initial matter, the parties do not dispute that English law governs in determining the proper amount of damages to be awarded for this breach of contract and, accordingly, that is the law that we apply. *See Guaranty Nat. Ins. Co. v. Azrock Industries Inc.*, 211 F.3d 239, 243 (5th Cir. 2000) (citing *N.K. Parrish, Inc. v. Southwest Beef Indus. Corp.*, 638 F.2d 1366, 1370 n.3 (5th Cir. 1981)). Turkmenneft argues that the arbitration panel erred by failing to apply what it calls a market-based discount rate, adjusted only by excluding consideration of internal political risk, in determining the present-value equivalent of the estimated future income lost as a result of the breach. In short, Turkmenneft asserts that the arbitrator downplayed or ignored market forces when setting the discount rate. And, because the arbitrator's decision called for a discount rate that resulted in damages ostensibly greater than necessary for full compensation, Turkmenneft argues that the arbitrator's decision runs counter to English law, which limits recovery to actual damages. *See, e.g., Robinson v. Harmon*, 1 Exch. 850, 855 (1848); *Ruxley Electronics & Const. Ltd. v. Forsyth*, [1995] 3 All. E.R. 268 (H.L. 1995); *Attorney General v. Blake*, [2001] 1 A.C. 268, 282 (H.L. 2000). At bottom, then, Turkmenneft's appeal challenges the merits of the arbitrators' determination of the discount rate, and specifically requests that this court second-guess the arbitrators' determination in that regard.

It has been determined in this circuit that the selection of a discount factor "is a question of fact to be determined by the trier of fact." *Huggs, Inc. v. LPC Energy, Inc.*, 889 F.2d 649, 657 (5th Cir. 1989) (*citing Monessen Southwestern Ry.*

Co. v. Morgan, 486 U.S. 330 (1988)). The force of this language is strengthened by the rigors of the manifest-disregard test, which, as discussed, supra, endows arbitrators with wide discretion. *See, e.g., Williams*, 197 F.3d at 762.

Turkmenneft cites no English law that compels the use of a particular discount rate, or establishes a methodology for calculating the same.[15] And, there is simply no merit to Turkmenneft's assertion that the arbitrator's selected discount rate cannot, as a matter of law, possibly establish present-value damages equivalent to the stream of revenues projected to have been lost as a result of the breach. Present-value determinations are not an exact science; competent experts and competent arbitrators can adopt highly divergent opinions without being deemed incorrect as a matter of law. Here, the Tribunal considered a variety of evidence and considered the factors that it deemed most appropriate for this particular income stream: the risk inherent in the venture, potential inflation, and the time-value of money. Thus, given that (i) Turkmenneft can cite no legal authority indicating that the arbitrator misapplied the law, (ii) an arbitrator's determination of a discount rate is a question of fact that will depend on the case's unique circumstances and on differing opinions regarding financial or economic theory, and (iii) the high degree of deference we afford arbitral decisions of this kind, it is clear that Turkmenneft cannot satisfy the first-prong of the manifest-disregard test. Because it is clear that the first prong of this test is not satisfied, we need not address the second. Accordingly, the district court's determination upholding the arbitrator's discount rate is affirmed.

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[15] Indeed, Turkmenneft cites, only a statement from a treatise that loss-of-the-bargain damages are generally approximated by the market-value of the property, money, or services that the plaintiff was entitled to have received under a contract. *See* Harvey McGregor, *McGregor on Damages* § 26 (16th ed. 1997).

IV.

The final issue of this appeal is whether the district court correctly refused to vacate the Tribunal's award on the ground that it exceeded its authority by awarding punitive damages. Punitive damages were expressly forbidden by the terms of the JVA.[16] Acknowledging that (i) discount rates are generally employed to determine compensatory damages, not punitive damages, and (ii) the arbitrator's decision did not explicitly award punitive damages, an undeterred Turkmenneft argues that the Tribunal implicitly awarded punitive damages by setting the discount rate too low, and thus exceeded its authority.

Section 10(a) of the FAA provides that a court may vacate an award if an arbitral tribunal exceeds its powers during the course of arbitration. 9 U.S.C. § 10(a). It is well-settled in this circuit that, as a general proposition, arbitral action contrary to express contractual provisions is not entitled to deference upon review. *See American Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Intern.*, 343 F.3d 401, 408 (5th Cir. 2003); *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989). Thus, if punitive damages were indeed awarded in this case, it would be incumbent upon us to vacate such an award, in spite of the discretion typically granted to arbitral decisions.

No plausible argument, however, can be made that the Tribunal awarded punitive damages. Under English law, punitive damages are those that extend "beyond mere compensation of the claimant." 1 Chitty on Contracts § 27-017 (H.G.Beale, gen. ed., 28th ed. 1999). *See also Attorney General v. Blake*, [2001] 1 A.C. 268, 282 (H.L. 2000). Thus,

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[16] Article 24.4(H) of the JVA explicitly limits the damages that may be awarded, stating that "consequential, punitive, or other similar damages shall not be allowed."

any award that does not further the goal of compensation is impermissible under the terms of the agreement. Turkmenneft's bald claims to the contrary, there is simply no colorable argument that an award of punitive damages was embedded in the arbitrator's determination of the discount rate, given our conclusion, *supra*, that the arbitrator did not manifestly disregard the law in setting the discount rate. Thus, because there was no explicit award of punitive damages and the discount rate, a device used for setting compensatory damages, was not selected in manifest disregard of the law, we reject Turkmenneft's argument that the arbitrator awarded punitive damages. Accordingly, the district court's determination on this issue is also affirmed.

CONCLUSION

For the foregoing reasons, the district court's decision refusing the vacate the FPA because the Government was subject to the jurisdiction of the Tribunal is VACATED and REMANDED. The district court's refusal to vacate or modify the TPA or Final Award is AFFIRMED.

VACATED and REMANDED in Part, AFFIRMED in Part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. H-99-2171

Bridas S.A.P.I.C.; Bridas Energy International, Ltd.;
Intercontinental Oil & Gas Ventures, Ltd.;
Bridas Corporation, Plaintiffs,

v.

Government of Turkmenistan;
Concern Balkannebitgazsenagat;
and State Concern Turkmenneft,
Defendants.

[October 1, 2001]

ORDER

Pending before the Court are Defendant Turkmenistan's motion to vacate and refuse confirmation of the First Partial Award **(Instrument No. 13)**; Defendant Turkmenistan's conditional motion to vacate or modify the Third Partial Award **(Instrument No. 71)**; Defendant Turkmenneft's motion to vacate or modify the Third Partial Award **(Instrument No. 72)**; and Defendants Turkmenistan and Turkmenneft's motion to vacate or modify the Final Award **(Instrument No. 90)**.

Having considered the parties' submissions and the applicable law, the Court finds that the motions are **DENIED** and the arbitration awards are **CONFIRMED**.

I.

Plaintiffs Bridas S.A.P.I.C.; Bridas Energy International, Ltd.; Intercontinental Oil and Gas Ventures, Ltd.; and Bridas Corporation (collectively "Bridas") originally brought this action to confirm an international arbitration award rendered in Bridas' favor against Defendants Government of Turkmenistan; Concern Balkannebitgazsenagat; and State Concern Turkmenneft (collectively "Defendants"). (Instrument No. 1).

Bridas, an Argentinian corporation, entered into an agreement on February 10, 1993, with Turkmenneft. The joint venture agreement was created "for the purpose of conducting hydrocarbon operations in an area in southwestern Turkmenistan, known generally as Keimir." (Instrument No. 1, at 3). It created a joint venture entity called Joint Venture Keimir ("JVK").[1] The relevant part of article XXIV of the agreement stipulates that "[a]ny dispute, controversy or claim arising out of or in relation to or in connection with th[e] [a]greement ...shall be exclusively and finally settled by arbitration, and any Party may submit such a dispute, controversy or claim to arbitration." (Instrument No. 75, Ex. 4, at 39). The parties further agreed that any arbitration would be "conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce as amended from time to time." (*Id.*).

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[1] The crude oil produced by JVK was delivered to the Turkmenbashi Refinery ("Refinery"). In 1996, after the Refinery failed to pay for the delivered crude oil, JVK commenced arbitration proceedings against it. JVK prevailed in the arbitration on November 30, 1997. On May 28, 1999, the arbitral award rendered in favor of JVK was confirmed by Judge Lake of the Southern District of Texas.

Moreover, Turkmenneft, which was referenced in the agreement as the "Turkmenian Party," represented that:

> To the extent that [it] may claim for itself, or any of its property immunity from enforcement of the arbitral award; Turkmenian Party hereby irrevocably waves [sic] and agrees not to claim such immunity and consents enforcement [sic] or execution of any order, judgement or decision in those proceedings to full extent.

(*Id.* at 40).

In 1995, Bridas contends that the Government of Turkmenistan ("Turkmenistan") "ordered Bridas to suspend further work in Keimir, and prohibited Bridas from making imports and exports in or from Turkmenistan." (Instrument No. 22, at 6). Accordingly, on April 16, 1996, Bridas initiated an arbitration proceeding against the Defendants with the International Chamber of Commerce ("ICC"). (Instrument No. 75, Ex. 1, at 4).

On June 21, 1996, Turkmenistan argued to the ICC Court of Arbitration that it was not a proper party to the arbitration because, among other reasons, it did not sign the joint venture agreement which contains the arbitration clause. The ICC Court confirmed by letter dated June 27, 1996, that the issue of jurisdiction over Turkmenistan should be resolved by the ICC arbitral tribunal. The dispute was subsequently referred to a three-person tribunal. Following the formation of the tribunal, the parties began preparing the Terms of Reference, which set forth the rules and issues governing the arbitration. Turkmenistan did not sign the Terms of Reference and secured the inclusion of a passage which clarifies that "the Government [of Turkmenistan] asserts that it is not subject to the jurisdiction of this tribunal and that the tribunal lacks jurisdiction to determine its own jurisdiction over the Government." (Instrument No. 1, Ex. A, at 11).

The arbitral proceedings, which began in January 1997, involved 19 days of hearings, various expert reports and testimony concerning damages from all parties, and extensive legal briefing. (Instrument No. 83, Ex. A). On June 25, 1999, a two-person majority of the tribunal issued its First Partial Award. (Instrument No. 75, Ex. 1). The First Partial Award determined, among other things, that the arbitrators possessed the power to determine jurisdiction over Turkmenistan. The arbitral panel ruled that Turkmenistan's failure to sign the joint venture agreement was "not determinative of the issue" because Turkmenistan "has taken no steps to extricate itself from the proceeding." (*Id.* at 11). The arbitrators relied on the fact that, in their evaluation of the evidence, there were at least 22 commitments in the joint venture agreement "that only the Government [of Turkmenistan] could give or fulfill," (*Id.* at 15), including a set tax rate to which JVK would be subject and a representation that Bridas' employees would be deemed non-residents for tax purposes. (*Id.* at 15-17). Consequently, the arbitral panel ruled the "the Government [was] a proper party to the arbitration." (*Id.* at 72). The other relevant ruling in the First Partial Award is a finding that the Defendants repudiated the joint venture agreement. The arbitrators held that:

> [I]f [Bridas] were to accept repudiatory conduct by the [Defendants] and [Turkmenistan] and thus to bring the [joint venture] [a]greement to an end, their damages would be calculated on a loss-of-bargain basis, involving 218,560,935 barrels of oil equivalent at a net-back price of $10.50 per barrel, using a discount rate of 10.446% based on a contract term of 25 years.

(*Id.* at 72).[2]

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[2] Bridas had requested that the arbitrators select a discount rate of 7.5%, whereas the Defendants asked for a 19.1% discount rate. The arbitrators

In a letter dated July 5, 1999, Bridas formally accepted the Defendants' repudiation of the joint venture agreement, which the arbitrators determined in the First Partial Award had occurred. (Instrument No. 75, Ex. 2, at 2). Subsequently, on October 21, 1999, the arbitrators issued their Second Partial Award.[3] In this Award, the two-person majority of the arbitral tribunal determined that they had "the jurisdiction to consider and make an award concerning [Bridas'] claim for damages arising out of their acceptance of the repudiatory conduct of the [Defendants] and [Turkmenistan]." (*Id.* at 10).

The Third Partial Award was rendered on September 2, 2000. (Instrument No. 74, Ex. 3). In this Award, the arbitrators clarified their previous rulings in the First Partial Award and calculated damages for Bridas. First, the panel held that the $10.50 net-back price it discussed in the First Partial Award only referred to the volume of crude oil, and not gas, which Bridas would have produced were it not for the Defendants' repudiation. (*Id.* at 8). Second, the arbitral panel rejected the Defendants' argument that the First Partial Award erroneously determined the barrels of oil equivalent[4] ("BOE") to be 218,560,935. The arbitrators ruled that hearings subsequent to the First Partial Award did not provide any "relevant new information" and that "the exploitation of the resource over 25 years did not change

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rejected the Defendants' "fair market value approach" in its discount rate calculation. Likewise, they ruled that Bridas' "rate is too low and does not adequately reflect risk and the provision of the contract." (Instrument No. 75, Ex. 1, at 27).

[3] The Defendants do not seek to vacate or modify the Second Partial Award before the Court.

[4] In this arbitration, the BOE is "a composite expression of the volumes of oil and gas," (Instrument No. 74, Ex. 3, at 8), and was used to assign a monetary value to the future losses over a 25-year period which Bridas incurred as a result of the repudiation.

materially from the time of the previous hearings to July 5, 1999." (*Id.* at 9-10). Finally, the arbitrators held that the 10.446% discount rate was the appropriate rate because "[i]t was higher than the non-risk [7.5%] discount factor advanced initially by [Bridas] and takes into account the various risk referred to by the parties in the evidence, including those that derive from a consideration of the production plan insofar as it delays or eliminates volumes of production." (*Id.* at 9). Based on the evidence adduced over the course of the proceedings, the panel concluded that approximately 75% of Bridas' lost oil and gas income stream was attributable to gas and awarded Bridas $295,000,000. The arbitrators added $200,000,000 for the value of oil for a grand total of damages at $495,000,000. (*Id.* at 12). The arbitrators applied a 10% interest rate per annum to the Third Partial Award.

In the Final Award, issued on January 26, 2001, the arbitral panel addressed a point of error raised by Bridas following the Third Partial Award. (Instrument No. 83, App. C, Ex. A, at 7). Bridas argued that the arbitrators neglected to include as damages 50% of the amount of the Turkmenbashi Refinery Award, which was later confirmed by Judge Lake. *See infra* n.1. The JVK arbitration was initiated by the Plaintiffs on behalf of JVK against the Turkmenbashi Refinery for breach of contract. JVK was awarded $56,846,000; the award was confirmed by Judge Lake at a compound interest rate of 5.48% per annum. The arbitrators agreed with Bridas and rendered $28,423,000 as damages for Bridas representing its share of the Refinery Award to be accrued at 10% per annum. (*Id.* at 3).

The lawsuit was initiated on July 7, 1999, when Bridas filed its application for confirmation of the First Partial Award. (Instrument No. 1). Turkmenistan subsequently filed a motion to dismiss application for confirmation and to vacate and refuse confirmation of the First Partial Award on

October 1, 1999.[5] (Instrument No. 13). It argues that it is immune from this Court's jurisdiction under the Foreign Sovereign Immunities Act and that it was improperly served with process. (*Id.* at 4-7 and 29-34). Additionally, Turkmenistan asserts that the First Partial Award must be vacated because it was not a proper party to the arbitration. According to Turkmenistan, it was not a signatory to the joint venture agreement and its administrative acts of guaranteeing the rights of the joint venture do not establish an intent to submit to the jurisdiction of the arbitral panel. (*Id.* at 10-21).

Bridas filed its response to Turkmenistan's motion on December 1, 1999. (Instrument No. 22). They contend that arbitrators have jurisdiction to determine their own jurisdiction. Moreover, they represent that Turkmenistan consented to the power of the arbitral panel by failing to take any legal action in any court of any jurisdiction. Additionally, Bridas contend that Turkmenistan's status as a non-signatory to the joint venture agreement is not determinative and that the contents of the agreement and Turkmenistan's involvement in the joint venture warrants its inclusion in the arbitration. (*Id.* at 20-23). In its response, Bridas also moved the Court to confirm the Second Partial Award. (*Id.* at 26).

On December 3, 1999, the Court denied Bridas' application to confirm the First Partial Award without prejudice. (Instrument No. 28). Despite a prohibition by the Court "not [to] address substantive issues in letter form because they are not docketed or included in the appellate record," Procedures of Judge Vanessa D. Gilmore, Rule 1(E), Bridas informed the Court by letter correspondence that it

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[5] Turmenneft also filed a motion to dismiss application for confirmation and to vacate and refuse confirmation of the First Partial Award on October 1, 1999. (Instrument No. 15). However, in subsequent pleadings, Turkmenneft withdrew its motion to vacate the First Partial Award. (Instrument No. 68, at 1 n.3).

was withdrawing its "application for confirmation of arbitration award filed July 7, 1999, and [the] motion to confirm the first and second partial awards." (Instrument No. 46, Ex. A).

Bridas filed a supplemental brief on November 20, 2000. (Instrument No. 64). Bridas maintains that the Defendants have waived their challenges to the First Partial Award by accepting the Second Partial Award. (*Id.* at 7-8). Accordingly, Bridas submits that the Defendants are estopped from seeking to vacate the First Partial Award. (*Id.* at 8-11). Turkmenistan replies on December 5, 2000, that it did not waive its challenge to the First Partial Award by failing to dispute the Second Partial Award because the Second Partial Award's validity hinges on the First Partial Award's validity. (Instrument No. 68, at 5). As to the estoppel issue, Turkmenistan argues that it is not estopped because the issues in the Second Partial Award are not identical to the issues raised in the First Partial Award. (*Id.* at 6).

On December 22, 2000, Turkmenneft filed its motion to vacate or modify the Third Partial Award. (Instrument No. 72). Turkmenistan also filed a motion to vacate or modify the Third Partial Award and adopted the arguments asserted by Turkmenneft. (Instrument No. 71). The Defendants assert that the arbitrators erred in its approach to calculating the risk that Bridas' expected revenues from oil and gas production would not be realized in full. (*Id.* at 21-30). Specifically, they complain that the arbitral panel's selection of a BOE of 218,560,935 is from Bridas' experts, despite their previous statement that they "prefer[red] the evidence of the [Defendants'] experts on this point." (*Id.* at 22) (quoting Instrument No. 75, Ex. 1, at 27-28)). Additionally, the arbitral panel allegedly selected an incorrect discount rate which fails to account for the risk that the anticipated oil and gas revenues will not be realized. (Instrument No. 72, at 27). The Defendants argue that neither party argued for the

10.446% discount rate eventually selected by the arbitral panel. (*Id.* at 29).

Accordingly, the Defendants urge the Court to vacate the Third Partial Award on the grounds that the arbitrators acted as *amiable compositeurs* by deciding the arbitration on the basis of equity, and not law. (*Id.* at 30-34). Additionally, the Defendants maintain that the Award is not valid because there are no reasoned explanations as required by the ICC Rules of Arbitration (*Id.* at 34-38). Because of the alleged lack of reasoned explanations and suspect methodology, the Defendants represent that the arbitral panel awarded non-compensatory damages in contravention of the joint venture agreement and English law, which was agreed by the parties to control the contract. (*Id.* at 38-40). According to the Defendants, the arbitrators also failed to provide a fundamentally fair hearing by refusing to hear relevant information from a similar arbitration. (*Id.* at 40-42). Alternatively, the Defendants urge the Court to find that the arbitrators are guilty of "other misbehavior" under the Federal Arbitration Act, (*Id.* at 42-44), or that the arbitrators' decision is in manifest disregard of the law. (*Id.* at 44-47). Finally, the Defendants seek modification of the Third Partial Award on the basis that the arbitral panel made an evident material miscalculation of the figures. (*Id.* at 47-48).

Bridas filed their response to the Defendants' motions to vacate or modify the Third Partial Award on February 9, 2001.[6] (Instrument No. 83). First, they assert that the Defendants' *amiable composition* argument is without merit because the arbitrators expressly acknowledged that they are bound by the law and proceeded to decide the case on that basis. (*Id.* at 15-16). Next, Bridas maintains that the arbitrators clearly provided reasons for their decision and

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[6] Bridas also filed a supplemental response to the Defendants' motion on February 14, 2001. (Instrument No. 84). However, it is identical in substance, and nearly identical in form, to Bridas' initial response.

that, in any event, reasoned explanations are not required by the version of the ICC Rules of Arbitration which applied to this arbitration. (*Id.* at 17-19). Similarly, Bridas argues that there is no support for the position that the arbitrators acted in manifest disregard of the law because the Defendants fail to identify any English law or otherwise that was disregarded during the arbitral proceedings. (*Id.* at 19-22). As to the Defendants' contention that the panel should have considered the results of a similar arbitration award in their proceedings, Bridas asserts that the Defendants have failed to identify the relevance of that award to the present arbitration. (*Id.* at 22-26). Bridas next argues that the Defendants' complaint of prohibited punitive damages is simply their "discount rate argument in another garb." (*Id.* at 26). Finally, Bridas maintains that there is no credible evidence to support the Defendants' belief that the arbitral panel engaged in "other misbehavior" to warrant vacatur under the FAA, or that the arbitrators' 10.446% discount rate is an evident material miscalculation, as opposed to a mere argument relating to the credibility of each party's evidence. (*Id.* at 28-31).

On May 2, 2001, the Defendants filed their motion to vacate or modify the Final Award. (Instrument No. 90). The Defendants argue that the final arbitral award should be vacated or modified because the arbitrators "made an interest rate mistake" in awarding damages to the Plaintiffs. According to the Defendants, the arbitrators erroneously applied a simple interest rate of 10% per annum to the $28,423,000, which represents 50% of the award rendered in JVK's favor in the arbitration proceeding against the Turkmenbashi Refinery. They contend that the arbitrators should have applied the 5.48% compound interest rate confirmed by Judge Lake in the litigation stemming from the JVK arbitration.

Bridas responded to the Defendants' motion on May 22, 2001. (Instrument No. 94). Bridas maintains that the 10% interest rate was correctly applied because "[t]he parties had

agreed to . . . treat the Refinery Award as if 100% of it had been paid to Turkmenistan" as a partner in the JVK entity. (*Id.* at 7). Because Bridas' 50% share of the present arbitration award would be paid from its former partners in the joint venture agreement, as opposed to the Turkmenbashi Refinery, Bridas contends that the 5.48% compound interest rate does not apply. Instead, Bridas asserts that the 10% simple interest rate which the arbitrators rendered in the third arbitral award is controlling. (*Id.*).

II.

Federal policy favors arbitration. *See Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995). Judicial review of an award rendered by arbitration is "extraordinarily narrow and this Court should defer to the arbitrator's decision when possible." *Antwine v. Prudential Bache Secs.*, 899 F.2d 410, 413 (5th Cir. 1990). Under the Federal Arbitration Act, 9 U.S.C. § 10 *et seq.*, the Court reviews an arbitrator's award "under a highly deferential standard" which has been described as "among the narrowest known to the law." *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 726 (N.D. Tex. 1997) (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)).

Indeed, the Court may not vacate an award merely on the basis of "errors in interpretation or application of the law, or mistakes in fact finding." *Antwine*, 899 F.2d at 413 (citing *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)); *see also Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) holding that "even clear or gross errors [] do not authorize courts to annul awards"). The basis for the strong level of deference towards an arbitrator's decision stems from the belief that "[b]y consenting to arbitration, parties exchange 'the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Antwine*, 899 F.2d at 413

(quoting *Mitsubishi Motors Corp. v. Soler Chrsyler Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

III.

A.

The arbitrators determined in the First Partial Award rendered on June 25, 1999, in relevant part, that Turkmenistan was a proper party to the joint venture agreement signed by the Plaintiffs and Turkmenneft. (Instrument No. 24, Ex. 1, at 72). Subsequently, on July 7, 1999, Bridas filed an application for confirmation of the First Partial Award. (Instrument No. 1). Turkmenistan responded to the application by filing its motion to vacate and refuse confirmation on October 1, 1999. (Instrument No. 13).

1.

Turkmenistan contends that the First Partial Award can be vacated under the standards prescribed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("New York Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted* at 9 U.S.C. § 201. Under the New York Convention, Turkmenistan maintains that three Article provisions warrant vacatur and refusal of confirmation: (1) there was no valid arbitration agreement between Bridas and Turkmenistan under Article V(l)(A); (2) the exercise of arbitral jurisdiction over Turkmenistan exceeded the arbitrators' powers under Article V(1)(c) because a valid arbitration agreement did not exist; and (3) confirmation of the First Partial Award would violate public policy under Article V(2)(b). (Instrument No. 13, at 26-29).

Bridas does not dispute that the FAA provides a means to vacate the First Partial Award, but argues that the New York Convention, on the other hand, "does not deal with vacatur of arbitral awards." (Instrument No. 22, at 10). According to

Bridas, "[w]hile the [New York] Convention and its implementing legislation can be invoked by a party seeking to confirm an arbitral award, . . . [Bridas] can find no case in which the [New York] Convention or its implementing legislation was applied to make confirmation of an award made in the U.S. more difficult or cumbersome than confirmation would be under the FAA." (*Id.* at 12).

The Court finds Bridas' arguments persuasive. The provisions of Article V of the New York Convention cited by Turkmenistan are the "exclusive grounds for refusing confirmation under the Convention." *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997) (emphasis added). That is, although Turkmenistan may rely upon Article V as a defense to an action for confirmation, it may not affirmatively employ the New York Convention's provisions to vacate an arbitration award. *See Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 478 (7th Cir 1997) (holding that "the New York Convention contains no provision for seeking to vacate an award"). Additionally, in this case, Bridas' application to confirm the First Partial Award and Second Partial Award were withdrawn. (Instrument No. 64, at 4) (stating that "Bridas withdrew its motions to confirm the F[irst] P[artial] A[ward] and the S[econd] P[artial] A[ward]"). Accordingly, to the extent that Turkmenistan also urges the Court to refuse confirmation of the First Partial Award under the New York Convention, its motion is **DENIED** as moot.

Although Turkmenistan may only utilize Article V of the New York Convention as a defense to a petition for confirmation, Article V(1)(e) authorizes "the possibility of [an] award[] being set aside in a proceeding under local law." *Lander*, 107 F.3d at 478 (citing 21 U.S.T. at 2520). "There appears to be no dispute...that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state." *Yusuf*, 126 F.3d at 745; *cf. International Standard*

Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172, 178 (S.D.N.Y. 1990) (holding that petition to vacate award in United States was not cognizable because "since the situs, or form of the arbitration is Mexico, and the governing procedural law is that of Mexico, only the courts of Mexico have jurisdiction under the [New York] Convention to vacate the award").

Here, the "rendering state" was the United States and, consequently, the "domestic law" controlling the present arbitration is the FAA. *See Satcom Int'l Group PLC v. Orbcomm Int'l Partners, L.P.*, 49 F. Supp. 2d 331, 337 (S.D.N.Y. 1999) (holding that "[t]he [New York] Convention is enforced in United States courts in accordance with the Federal Arbitration Act").

2.

Turkmenistan argues that the First Partial Award should be vacated because it was not a party to the joint venture agreement. (Instrument No. 13, at 7). According to Turkmenistan, its only participation in the ICC arbitration proceedings "was the filing of its objection to the assertion of jurisdiction." (*Id.*). It believes that, as a non-signatory to the joint venture agreement, the arbitrators lacked the jurisdictional authority to decide whether Turkmenistan was a proper party to the arbitration. Additionally, Turkmenistan maintains that, upon independent review, there are no surrounding circumstances indicating that it intended to allow the arbitrators to decide the issue of jurisdiction over Turkmenistan. (*Id.* at 7-25).

In contrast, Bridas maintains that Turkmenistan's participation in the arbitral proceedings demonstrate that it was a proper party to the arbitration regardless of its non-signatory status. (Instrument No. 22, at 15-26). It contends that Turkmenistan did not seek to extricate itself from the arbitral proceedings before the ICC tribunal other than to contest jurisdiction and that it collaborated in the preparation

of the Terms of Reference. (*Id.* at 17-18). As to Turkmenistan's argument that it should not have been a party to the arbitration because it was a non-signatory, Bridas represents that "in some cases justice actually requires that non-signatories be considered as bound." (*Id.* at 21).

The issue facing the Court is whether the ICC arbitral tribunal possessed the power to decide whether Turkmenistan, a non-signatory to the joint venture agreement, was subject to the arbitral proceedings as a responding party. The Court begins its analysis by noting that arbitration is a favored means of settling disputes under federal and State of Texas law. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Fridl v. Cook*, 98 S.W.2d 507, 511 (Tex. App.-El Paso 1995, writ dism'd w.o.j.). However, "such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract." *Thomson-CFS, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). Consequently, courts should not assume that a party has agreed that an arbitrator should decide the issue of jurisdiction unless there is "clear and unmistakable" evidence that it did so. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995). In the absence of "clear and unmistakable" evidence, the Court must subject the issue of the arbitral tribunal's power to assert jurisdiction over Turkmenistan to independent review. *See id.*

Here, the Court finds that Bridas has failed to show "clear and unmistakable" evidence that Turkmenistan intended to subject the issue of jurisdiction to the arbitral tribunal. In *First Options*, the respondents argued that their disagreement with the petitioner was not arbitrable because they did not personally sign the document containing an arbitration agreement. The Supreme Court held that there was no "clear and unmistakable" evidence of the respondents' intent to have the arbitrators decide the question of arbitrability. According to the Court, "merely arguing the arbitrability

issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator's decision on that point." *Id.* at 946. The Court additionally ruled that the presence of alternative legal means of contesting the arbitrators' jurisdiction was irrelevant because they do "not say anything about whether the [respondents] intended to be bound by the arbitrators' decision." *Id.*

In this case, Bridas has articulated at least two of the same arguments specifically rejected by the *First Options* Court. Although Bridas, like the *First Options* petitioner, contends on several occasions that "Turkmenistan [] failed to take any action other than to argue time and again before the Tribunal that the ICC Court had wrongly launched the arbitration," (Instrument No. 22, at 18), that fact is simply immaterial to the issue of Turkmenistan's intent to be bound. Additionally, Turkmenistan's appearance before both the ICC Court and the arbitral tribunal consistently resisting jurisdiction does not, as *First Options* decided, "indicate a clear willingness to arbitrate that issue." *Id.*

Given the lack of "clear and unmistakable" evidence that Turkmenistan intended for the arbitrators to decide their jurisdiction over Turkmenistan, the Court must subject the issue to independent review. The Court begins its review by pointing out that "[w]ell-established common law principles dictate that in an appropriate case a non-signatory can enforce, or be bound by, an arbitration provision with a contract executed by other parties." *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000); *see also Thomson*, 64 F.3d at 776 (holding that "a nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency'"); *Trefny v. Bear Stearns Secs. Corp.*, 243 B.R. 300, 316 (S.D. Tex. 1999) (same). There are five theories under which a non-signatory may be bound to an arbitration agreement: (a) incorporation by

reference; (b) assumption; (c) agency; (d) veil-piercing / alter ego; and (e) estoppel. *See Thomson*, 64 F.3d at 776.

First, under the theory of incorporation by reference, "a nonsignatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the nonsignatory which incorporates the existing arbitration clause." *Id.* In this case, Bridas has not presented any evidence of a separate contractual agreement between itself and Turkmenistan. Thus, Turkmenistan cannot be bound under this theory.

Second, even in the absence of a signature, a party can assume the obligation to arbitrate based on its subsequent conduct. *Id.* As the Court's discussion of *First Options* demonstrates, Turkmenistan's participation in the arbitral proceedings was focused on objecting to the ICC's jurisdiction. Accordingly, there is no evidence that Turkmenistan assumed the obligation to arbitrate.

Third, "[t]raditional principles of agency law may bind a nonsignatory to an arbitration agreement." *Id.* Here, the evidence presented to the arbitrators and the Court shows that, although Turkmenistan did not officially sign the joint venture agreement, it controlled the decisions made by signatory Turkmenneft. In the joint venture agreement, Turkmenistan confirmed that "[a]ll Joint Venture Keimir rights . . . established in the organization documents are fully and completely guaranteed by the Government, and there is no additional need for any further decisions, decrees or approvals." (Instrument No. 25, Ex. 1M, at 51). Additionally, on March 10, 1995, the Ministry of Oil and Gas Industry of the USSR wrote to the joint venture's director general: "The matter is that, in accordance with the terms of the [JVK] agreement, the Ministry is the Turkmenian Party and, in accordance with the provisions of Article 20.1 has the right to obtain any kind of information." (*Id.* at 70). Moreover, under Article 22.3 of the agreement, the

"[i]nterests, rights and obligation of Turkmenistan" is represented by the Turkmenian Party. (*Id.*, Ex. 1A, at 17). Consequently, principles of agency bind Turkmenistan to the arbitration because Turkmenneft, as the Turkmenian Party, acted as its agent in the joint venture agreement.

Fourth, a parent can be legally accountable for the actions of its subsidiary if the relationship between the two is "sufficiently close as to justify piercing the corporate veil." *Thomson*, 64 F.3d at 777. A parent and subsidiary lose their distinct identities when "their conduct demonstrates a virtual abandonment of separatedness." *Id.* Furthermore, "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988). In the present case, the evidence shows that Turkmenneft was controlled by the government of Turkmenistan. Despite this control, however, Bridas has not offered evidence proving "an absence of corporate formalities." *Thomson*, 64 F.3d at 778. Moreover, there is no indication of "an intermingling of corporate finances and directorship" between Turkmenneft and the government. *Id.* Thus, Turkmenistan cannot be bound under an alter ego theory.

Finally, a non-signatory can be bound to an arbitration agreement under an estoppel theory. Numerous courts have recognized that a signatory to an arbitration agreement must arbitrate with a non-signatory where the non-signatory seeks to resolve by arbitration issues that are intertwined with the agreement. *See, e.g., Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993). In this case, however, a signatory to an agreement seeks to force a non-signatory to arbitrate. Because Bridas has not presented any specific evidence that Turkmenistan agreed to arbitrate, it should not be "estopped from denying the existence of an

arbitration clause to which it is a signatory because no such clause exists." *Thomson*, 64 F.3d at 779. However, the Fifth Circuit has determined that "application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000). Here, the allegations asserted by Bridas implicate both Turkmenneft and Turkmenistan. That is, the issues Bridas raised as to the repudiation of the joint venture agreement dealt with acts committed by Turkmenneft and Turkmenistan. Accordingly, Turkmenistan is also bound to the arbitral proceedings by estoppel. Turkmenistan's motion to vacate the first Partial Award under the FAA for lack of jurisdiction is **DENIED**.

3.

Turkmenistan argues that the Court is without jurisdiction over it pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.* (Instrument No. 13, at 4-7). Under the FSIA, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided sections 1605 to 1607." 28 U.S.C. § 1604. Because an exception to a foreign state's immunity applies, however, the Court finds that the FSIA does not preclude an exercise of jurisdiction over Turkmenistan. Under the FSIA's arbitration exception, in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the Unted States or of the States in any case – [] in which the action is brought, either to enforce an agreement made by the foreign state . . . to submit to arbitration . . . or to confirm an award made pursuant to such an agreement to arbitrate [] if [] the

> arbitration takes place or is intended to take place in the United States.

28 U.S.C. § 1605(A)(6)(A).

Here, the Court finds that the FSIA's immunity does not apply to Turkmenistan because it is bound by the joint venture agreement's arbitration provision. Because the arbitration between the parties in this case took place in Houston, Texas, the arbitration exception precludes immunity. In addition to the subject-matter jurisdiction granted to the Court by virtue of the arbitration exception, the Court also has personal jurisdiction over Turkmenistan because "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject-matter] jurisdiction . . . where service has been made." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (quoting 28 U.S.C. § 1330(b)).[7]

Accordingly, the Court's remaining inquiry is whether Turkmenistan was properly served with process. Under section 1608 of the FSIA, in relevant part, service of process

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[7] Turkmenistan argues that Bridas must establish that the due process requirements for personal jurisdiction have also been satisfied. Although the Supreme Court has questioned whether a foreign state qualifies as a "person" for purposes of the due process clause, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966)), the Court nevertheless finds that Turkmenistan has the requisite "minimum contacts" to warrant constitutional *in personam* jurisdiction. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that a defendant must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of faire play and substantial justice"). In this case, the arbitration took place in Houston, Texas. Although Turkmenistan's participation in the arbitral proceedings was limited to its position that the panel lacked jurisdiction over it, Turkmenistan's participation in the Houston arbitration is sufficient minimum contacts for purposes of this Court's constitutional inquiry pertaining to personal jurisdiction.

can be made upon a foreign state or political subdivision of a foreign state "by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision." 28 U.S.C. § 1608(a)(1).

In this case, Bridas served Turkmenistan by mailing a copy of the summons and application for confirmation to the address listed in the "Addresses for Notification or Communications" section of the Terms of Reference. The address listed for Turkmenistan was that of Turkmenistan's legal counsel in Houston. Although Bridas did not directly serve Turkmenistan, the Terms of Reference made clear that any correspondence directed to it should be sent to the Houston legal counsel. Because Turkmenistan chose the address to which communications could be sent, its argument now that "service on counsel alone is generally ineffective" is disingenuous.

The Court finds that Bridas' service to the address listed in the Terms of Reference qualifies as "any special arrangement for service" under the FSIA. *See Marlowe v. Argentine Naval Commission*, 604 F. Supp. 703, 708 (D.D.C. 1985) (holding that service was sufficient where contracts provided addresses for the mailing of "notices, requests, demands or other communications to or upon the respective parties"). Here, the Terms of Reference clearly sets out addresses for "Notifications and Communications." (Instrument No. 1, Ex. A, at 2). Although Turkmenistan argues that any communication is deficient because its participation in drafting the Terms of Reference was merely to object to the arbitral panel's jurisdiction and nothing more, it voluntarily included an address to which notices, communications, and, in this case, service of process could be sent. Thus, the service of process was sufficient under section 1608.

Because Bridas has satisfied the requirements of establishing subject-matter jurisdiction, personal jurisdiction, and service of process, the Court finds that Turkmenistan's motion to dismiss Bridas' application for confirmation for lack of jurisdiction and faulty service is **DENIED**.

B.

On September 2, 2000, the arbitrators rendered their Third Partial Award. The decision was limited to an assessment of damages and costs. (Instrument No. 75, Ex. 3, at 3) (stating that "[t]he parties made it clear that at this stage of the proceedings they did not want the arbitrators to make orders or directives beyond a determination of damages and costs"). The Defendants complain that the Third Partial Award is rife with error. They assert that the arbitral panel refused to consider relevant information, engaged in other acts of misbehavior, impermissibly acted as *amiable compositeurs*, failed to give a reasoned award, erroneously rendered punitive damages, operated in manifest disregard of the law, and made a fundamental error of fact.[8] (Instrument No. 72, at 30-48).

1.

a.

The Defendants allege that the Third Arbitral Award should be vacated or modified because the arbitrators refused to consider the award rendered in the Yashlar arbitration. The Yashlar arbitration was a parallel arbitral proceeding involving a joint venture between Bridas and "various Turkmenian agencies." (Instrument No. 72, at 38).

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[8] Defendants Turkmenneft and Turkmenistan each filed separate motions to vacate or modify the Third Partial Award. (Instrument Nos. 71 and 72). However, Turkmenistan's motion "adopts and incorporates by reference . . . in full the Motion of Turkmenneft." (Instrument No. 71, at 2). Accordingly, the Court will only address the arguments set forth in Turkmenneft's motion.

According to the Defendants, "[t]he underlying joint venture agreements are nearly identical." (*Id.*) They argue that the Yashlar arbitration award "considered in detail the risks inherent in the marketing and export of natural gas from Turkmenistan [] and the appropriate discount rate to be used in light of those risks." (*Id.* at 38-39). In a letter from the chairman of the arbitral panel responding to the Defendants request for consideration, the parties were informed that "[i]t would not be appropriate for the arbitrators in either case to base their decisions on the conclusions in the other case." (Instrument No. 75, Ex. 35, at 1). The Defendants complain that the panel's refusal to consider the Yashlar award "prevented Turkmenneft from fully presenting its case." (Instrument No. 72, at 39).

In response, Bridas contends that the Yashlar award was not "evidence" and that the Defendants have not identified the type or significance of any information that would be adduced. (Instrument No. 83, at 23). Additionally, Bridas cites to previous representations by the Defendants in which they had contended that there was a "whole series of difference between" the two arbitrations and that discount rate calculations could not be imported between the Keimir and Yashlar cases. (*Id.*).

Under section 10(a)(3) of the FAA, arbitrators are "guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." However, it is an established principle of arbitration law that "the arbitrator is the judge of the relevance and admissibility of evidence introduced in an arbitration proceeding." *Castleman v. AFC Enters., Inc.*, 995 F. Supp. 649, 653 (N.D. Tex 1997). Indeed, an arbitrator's judgment as to the relevance of evidence is "part of the bargain, and a court's power to disturb such discretionary determinations is quite limited." *Pacific Breakwater West, Inc. v. Wellness Int'l Network, Ltd.*, Civ.A. 3:97-CV-1556, 2000 WL 276812, *3 (N.D. Tex. March 9, 2000). Although an arbitrator is not bound to hear all the evidence proffered,

"he must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments." *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex.*, 915 F.2d 1017, 1023 (5th Cir. 1990). An arbitrator's decision not to hear evidence will warrant the vacatur of an arbitration award where "the exclusion of the contested evidence prevented the parties from receiving a fundamentally fair hearing." *Castleman*, 995 F. Supp. at 653. Even assuming that an arbitrator made an evidentiary error by refusing to hear evidence, such a decision cannot simply be an error of law; an error must "so affect[] the rights of a party that it may be said that he was deprived of a fair hearing." *Forsythe*, 915 F.2d at 1023.

In this case, the arbitral panel's refusal to hear evidence pertaining to a parallel arbitration did not deprive the Defendants of a fundamentally fair hearing. The Defendants did not offer any reasoning as to the relevance of the Yashlar award other than the fact that it involved a dispute over a failed joint oil venture involving similar parties. Indeed, the Defendants themselves conceded that the arbitrators should not apply the same analysis from the Yashlar award because it "is a much different prospect" than the Keimir joint venture in that "[i]t's all exploratory, it's all gas, it's even more remote than Keimir." (Instrument No. 83, App. C, Ex. G, at 110). Furthermore, the Defendants' claim that they were denied the right to a "fundamentally fair hearing" due to the refusal to consider the Yashlar Award is all the more incredible given that they do not specify in their motion the information that would be derived from use of the award. The Defendants' position is also unsupportable because the parties engaged in literally hundreds of submissions and communications; presented their arguments at evidentiary hearings; and offered several expert reports dealing with the discount rate issue about which the Defendants now complain that they did not have a fair opportunity to be heard. Indeed, the arbitrators in this case performed more fact finding than other arbitrations which have been upheld

as fundamentally fair despite the refusal to hear evidence. *See, e.g., Pacific*, 2000 WL 276812, at *3 (holding that the arbitrator's refusal to conduct a formal hearing and disposition of the arbitration by summary judgment did not deny the plaintiffs of a fair hearing). Thus, the Court finds that the Defendants' motions to vacate or modify the Third Partial Award for failure to consider evidence is **DENIED**.

b.

The Defendants next argue that the Third Partial Award should be vacated or modified under the "other misbehavior" catch-all provision in section 10(a)(3). Specifically, the Defendants allege that the arbitral panel maintained a "rigid conformity [] to the contradictory and plainly erroneous advisory opinion on damages rendered in the First Partial Award . . . [which] deprived Turkmenneft of the opportunity for a fair and unbiased hearing on the merits." (Instrument No. 72, at 44). In response, Bridas argues that the Defendants have failed to identify specific acts by the arbitrators which constitute the alleged misbehavior. (Instrument No. 83, at 28). Moreover, Bridas contends that the alleged wrongdoing by the arbitrators here does not match the abuse of power in other cases which have vacated arbitral awards under section 10(a)(3).

Section 10(a)(3) provides that an award may be vacated where the arbitrators were guilty of "any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). The Defendants' complaint regarding the arbitrators' "rigid conformity" to their prior rulings is an argument that can be framed in a simpler way: the arbitrators are guilty of "other misbehavior" because they did not accede to the Defendants' position. The Defendants' vague contention is wholly without merit. The allegation here is not similar in any regard to those cases finding abuse or arbitral power. *See, e.g., Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d 649, 652-53 (5th Cir.

1979) (vacating award where arbitrators engaged in *ex parte* communication with a party to the case by accepting evidence days after the close of the hearings). Accordingly, the Court finds that the Defendants' motions to vacate or modify the Third Partial Award for "other misbehavior" is **DENIED**.

2.

Under section 10(a)(4) of the FAA, the Court may vacate an arbitration award where the arbitrators "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). Here, the Defendants assert that the arbitrators abused their authority in three ways. First, they maintain that the panel acted as *amiable compositeurs* by rendering an award in favor of Bridas on the basis of equity, and not the law. Second, the Defendants contend that the arbitrators failed to give reasoned explanations for their award. Third, they argue that the arbitral award contains punitive damages in contravention of the parties' agreement.

a.

The Defendants urge the Court to vacate the Third Partial Award on the basis that the arbitrators impermissibly acted as *amiable compositeurs* in rendering their decision. (Instrument No. 72, at 30-34). That is, they argue that, in direct contravention of the joint venture agreement and the Terms of Reference, the arbitrators made their decision based on notions of equity and fairness instead of the law. (*Id.* at 30-31). As a result of the arbitrators' alleged misconduct, the Defendants request that the Third Partial Award be vacated under section 10(a)(4) of the FAA. In response, Bridas concedes that the arbitrators were not permitted to act as *amiable compositeurs*. (Instrument No. 83, at 15). However, Bridas asserts that the arbitrators expressly acknowledged this restriction and proceeded to make their decision "anchored . . . in the law." (*Id.* at 15-16).

The proscription against acting as *amiable compositeur* is set forth in the Terms of Reference governing the arbitration. (Instrument No. 75, Ex. 32, at 14) (stating that "[t]he arbitrators are not authorized to act as amiable compositeur"). Indeed, the arbitrators specifically acknowledged this restriction in both the First and Third Partial Awards. (Instrument No. 75, Ex. 1, at 71) (stating that "[t]he arbitrators are obliged to decide the issues before them according to law and to ensure that their award is enforceable at law. They are not empowered to act as *amiable compositeurs* or to decide *ex aequo et bono*").

The Defendants primarily base their complaint on a passage in the Third Partial Award in which the arbitrators decided that "a fair assessment of the present value of the lost income stream for gas is $295,000,000 to which they add $200,000,000 for the value of oil, making a total of $495,000,000." (*Id.*, Ex. 3, at 12). However, the Defendants failed to cite an earlier excerpt in the Third Partial Award in which the arbitrators noted that:

> Calculation of the present-day value of [Bridas'] lost income stream is complex. It must take into account not only relevant risk and discount factors, but deductions dictated by the [joint venture] [a]greement. These include certain funds, royalties and taxes at different rates. The numbers advanced by the parties, as noted above, take these matters into account.

(*Id.* at 11).

The Defendants failed to cite any specific English law, or otherwise for that matter, to support its argument that the damages calculation was rendered on the basis of equity. On its face, the Third Partial Award demonstrates that the arbitrators did not act as *amiable compositeurs* in making its award. *See International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comerical*, 745 F.

Supp. 172, 180-81 (S.D.N.Y. 1990) (holding that the arbitrators did not act as *amiable compositeurs* despite their reference to the "equitable nature of the norms which govern [their] task").

The Defendants also maintain that the arbitrators were *amiable compositeurs* because the "10.446% [discount rate] was not proposed by any party or expert . . . [and otherwise] failed to account for all of the risks that must be included in the reduction of a long term profit stream to a present value in the context of Central Asian gas exports." (Instrument No. 72, at 32). As with their other grounds for relief, the Defendants seek to induce the Court to engage in its own fact-finding as to the discount rate calculation. However, "[i]t is not th[e] Court's role . . . to sit as the panel did and reexamine the evidence under the guise of determining whether the arbitrators exceeded their powers." *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819 (D. Del. 1990) (quoting *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir. 1989)). Despite their suggestion to the contrary, the Defendants have not established that the arbitrators were limited to choosing a discount rate proposed by either the experts hired by Bridas or the Defendants. Furthermore, the arbitrators clearly stated its rationale in the First Partial Award for selecting the 10.446% discount rate:

> The arbitrators conclude that a rate of 10.446% which is the rate charged by [Bridas] to the [Defendants] on [Bridas'] F[oreign] P[arty] C[ontribution] account, in the circumstances of this case reflects the reality of the factual context as of June 30, 1997, the notional date for the receipt of money, and the terms of the [joint venture] [a]greement.

Accordingly, the Court finds that the Defendants' motion to vacate the Third Partial Award for improper *amiable composition* is **DENIED**.

b.

The Defendants next allege that the Third Partial Award should be vacated or modified because the arbitrators failed to provide reasoned explanations for their award. (Instrument No. 72, at 34-38). According to the Defendants, a reasoned award is "absolutely required," (*id.* at 34), because it is "well-established practice[]" and mandated by the 1998 ICC Rules of Arbitration. (*Id.* at 35). The Defendants argue that the arbitrators' decision is not reasoned because "[i]n place of the experts' voluminous and carefully constructed studies, the [arbitrators] substitutes an eight-line 'back of the envelope' approximation of damages." (*Id.* at 36).

The arbitrators' ruling, the Defendants complain, "perpetuates without explanation earlier contradictions between the [arbitrators'] preferences for [Turkmenneft's] evidence [] and adoption of the volume number generated by [Bridas]." (*Id.*). The gravamen of this complaint stems from the First Partial Award, in which the arbitrators ruled that they preferred "the evidence of the [Defendants'] experts" as to the issue concerning the volume of oil and gas, or Barrels Oil Equivalent ("BOE"). The arbitrators proceeded to assign the BOE at 218 million, which the Defendants contend is actually the figure proffered by Bridas' experts.

Bridas responds that the Defendants have created "an apparent malfeasance where none exists." (Instrument No. 83, at 17). They argue that the arbitrators provided sufficient reasoning for its award and that the 1998 ICC Rules cited by the Defendants were not applicable to the present arbitration. Additionally, under federal law of the United States, Bridas maintains that there is no obligation for an arbitrator to

render the type of detailed and particularized findings demanded by the Defendants.

The Court finds the Defendants' arguments unpersuasive. In this case, the Defendants chiefly object that the arbitrators' rulings in the Third Partial Award are ambiguous. However, "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598 (1960). Additionally, "[a]rbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions." *Id.*; *see also Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 214 (5th Cir. 1993) (holding that "[a]rbitrators need not provide reasons for their award"); Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) (holding that "an arbitrator is simply not required to state the reasons for his decision . . . [because] [s]uch a requirement would serve only to perpetuate the delay and expense which arbitration is meant to combat").

In this case, the arbitrators rendered a 19-page opinion which specifically addressed the very issues that the Defendants raise again before the Court. (Instrument No. 75, Ex. 3). That the Defendants do not agree with the arbitrators' rulings on the merits does not mean, *a fortiori*, that the arbitrators failed to give reasoned explanations. Even assuming that were true, however, the arbitrators' errors of fact or law would not warrant vacatur of the award. "Generally, [the courts] will not vacate an arbitration award because the arbitrator made errors of fact or law. Federal courts will not vacate an arbitration award merely because the arbitrator misinterpreted applicable law." *National Wrecking Co. v. International Brotherhood of Teamsters*, Local 731, 990 F.2d 957, 961 (7th Cir. 1993) (citations omitted).

With respect to the Defendants' contention that the 1998 ICC Rules of Arbitration specifically require reasons for arbitral decisions, there is no evidence, other than the Defendants' dispute over the merits, that the arbitrators have failed to abide by the terms of the ICC Rules. The 19-page Third Partial Award considers the arguments raised by both parties. As to the discount rate, for instance, the arbitrators ruled that they "see no reason to depart from their earlier assessment of the appropriate discount factor. It was higher than the non-risk discount factor advanced initially by [Bridas] and takes into account the various risks referred to by the parties in the evidence, including those that derive from a consideration of the production plan insofar as it delays or eliminates volumes of production." (Instrument No. 75, Ex. 3, at 9).

Additionally, the 1998 ICC Rules do not apply because article 6(1) of those rules provides that parties "shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration proceedings unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement." 36 I.L.M. 1604, 1609 (1997). In this case, the agreement was signed in 1993 and the arbitral proceedings were initiated in 1996. Accordingly, the Court finds that the Defendants' motion to vacate or modify the Third Partial Award for lack of reasoned explanations is **DENIED**.

c.

The Defendants represent that the arbitrators exceeded their powers under section 10(a)(4) of the FAA by impermissibly awarding non-compensatory damages. According to the Defendants, the arbitrators "applied a discount rate that necessarily inflated Bridas's damages by failing to properly adjust future profits for the undeniable risks that those profits might never be earned." (Instrument No. 72, at 41). In response, Bridas contends that the

Defendants' complaint of punitive damages is merely their attempt to litigate the merits of the underlying arbitration. (Instrument No. 83, at 26-27).

The Defendants correctly note that punitive damages were not permitted in these arbitration proceedings pursuant to article 42.4(H) of the joint venture agreement. (Instrument No. 75, Ex. 4, at 40) (stating that "consequential, punitive, or other similar damages shall not be allowed"). In apparent recognition of this prohibition, the arbitrators flatly denied Bridas' request for punitive damages in the Third Partial Award: "[Bridas'] claim for punitive damages is dismissed." (*Id.*, Ex. 3, at 18). The arbitrators' damages calculation was derived from a BOE of 218,560,935; a net-back price of oil at $10.50; applicable term of 25 years; and a discount rate of 10.446%. (*Id.* at 11). The arbitrators concluded that 75% of the lost oil and gas stream was attributable to gas or $598,000,000. The arbitral panel ruled that the present value of the gas stream is $295,000,000 and the present value of the oil stream is $200,000,000. (*Id.* at 12). There is no evidence that the arbitrators exceeded their powers by rendering an award beyond that which compensates Bridas for its damages. Consequently, the Court finds that the Defendants' motions to vacate or modify the Third Partial Award for granting punitive damages is **DENIED**.

3.

The Defendants contend that, in lieu of vacatur, the arbitration award should alternatively be modified under section 11(a) of the FAA. They assert that the arbitrators made a "material mistake of fact by concluding that the discount rate should be 10.446%, a rate that was never offered into evidence by either side." (Instrument No. 72, at 47). The Defendants maintain that a mistake was made because "[t]he proper value for loss of bargain should be derived using the 19.1% discount rate submitted by [the

Defendants' expert], as there is no credible evidence supporting any other value." (*Id.* at 48).

Under section 11 of the Federal Arbitration Act, in relevant part, the Court may modify or correct an arbitration award "[w]here there was an evident material miscalculation of figures." 9 U.S.C. § 11(a) (2001). The word "miscalculation" suggests "inadvertence or an error caused by oversight." *Companhia de Navegacao Maritima Netumar v. Armada Parcel Serv., Ltd.*, No. 96 CIV 6441 (PKL), 2000 WL 60200, *5 (S.D.N.Y. Jan 25, 2000). Section 11(a) is generally used to correct clerical and other obvious errors. *See Atlantic Aviation, Inc. v. LBM Group, Inc.*, 11 F.3d 1276, 1284 (5th Cir. 1994).

The scope of review under section 11 is "extremely limited." *Id.* Indeed, "[i]f the award is rationally inferable from the facts before the arbitrator[s], [the Court] must affirm the award." *Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 214 (5th Cir. 1993) (citing *Anderman/Smith Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215 (5th Cir. 1990)); *see also Armada*, 2000 WL 60200, at *5 (holding that "if a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed"). Moreover, in those "few instances where courts have modified arbitration awards under § 11(a), the errors have always been obvious, and the opposing parties generally have not challenged the miscalculations." *Id.* at *7 (citations omitted).

In this case, the Defendants allege that the 10.446% discount rate is an "evident material miscalculation." Despite their conviction that "there is no credible evidence supporting any [discount rate] value" other than their expert's figures, the Court is not persuaded that the alleged discount rate error is the type of "typographical, clerical, [or] other obvious error[]," *Companhia de Navegacao*, 2000 WL 60200, at *7, warranting modification. Indeed, in the First

Partial Award, the majority arbitrators ruled with respect to the Defendants' 19.1% discount rate that the "analysis was based on a fair market value approach which [the arbitrators] reject." (Instrument No. 75, Ex. 1, at 27). Moreover, even the dissenting arbitrator stated in the Third Partial Award that he would employ a lower different discount rate than that requested by the Defendants. (*Id.*, Ex. 3, at 21) (stating that "the discount rate of 10.446[%] adopted by the majority appears too low. . . . Turkmenneft has argued that a discount rate of 19[%] would be proper []. I would adopt a discount rate of 15[%]"). Each entity in this arbitration—the majority, the minority, Bridas, and the Defendants—settled on a different discount rate. Accordingly, the majority's decision not to assign a 19.1% rate cannot reasonably be considered the product of an evident miscalculation or mistake. More importantly, the Court's "scope of review does not permit [it] to disturb the arbitrator's findings as to the relative credibilities of each side's evidence." *Eljer*, 14 F.3d at 1255. Thus, the Court finds that the Defendants' motions to modify the Third Partial Award due to an evident material miscalculation is **DENIED**.

4.

Finally, the Defendants contend that the Third Partial Award should be vacated because the arbitrators acted in manifest disregard of the law. As support for their argument, the Defendants cite the alleged errors previously discussed. Among the manifest errors, according to the Defendants: the arbitrators' "rigid[] conform[ity]" to its rulings in the First Partial Award; amiable composition in violation of the parties' agreement; application of an incorrect discount rate; rendering of punitive damages; and refusal to consider relevant information. (Instrument No. 72, at 45-46).

Although the FAA sets forth statutory grounds by which the courts may vacate an arbitration award, such an award may also be vacated on other grounds, as well. In First

Options, the Supreme Court ruled that "parties [are] bound by [a] arbitrator's decision [which is] not in 'manifest disregard' of the law." 514 U.S. 938, 942 (1995). "Manifest disregard" implies that "the arbitrator understood the existence of a governing legal principle but decided to ignore it." *Blanchard & Co., Inc. v. Heritage Capital Corp.*, No. 3:97-CV-0690-H, 2000 WL 1281205, *2 (N.D. Tex. Sep. 11, 2000) (citing *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 762 n.2 (5th Cir. 1999)). The Fifth Circuit has adopted the "manifest disregard" test in the employment law context, but it has not ruled as to the scope of its application, if any, to commercial contract arbitrations. *Blanchard*, 2000 WL 1281205, at *2 (holding that "[i]t is by no means clear that the Circuit will adopt this standard in all arbitration cases, given the distinction drawn by the Supreme Court and Fifth Circuit between commercial and employment arbitration").

In any event, even assuming that the "manifest disregard" test applies to the arbitration here, the Court finds that the Defendants have failed to demonstrate any manifest error of law warranting vacatur of the Third Partial Award. First, the Defendants' complaints of manifest errors are the identical claims already rejected by the Court under other statutory grounds. Second, the Defendants' assertions would require the Court to "second-guess a factual finding of the arbitration panel within its limited power of review." *Blanchard*, 2000 WL 1281205, at *3. The Defendants failed to cite any "law" which the arbitrators manifestly disregarded other than a terse contention that the arbitrators "[r]endered an award far in excess of the actual damages permitted by the English law of contracts by failing to adjust for the probability that projected revenues would not be realized." (Instrument No. 72, at 46). The Defendants' vague reference to the "English law of contracts" is not otherwise reinforced with analysis in their motions. Moreover, in contrast to the Defendants' representation, the First Partial Award demonstrates that the arbitrators considered the issue of risk and consequently

rejected Bridas' offered discount rate. (Instrument No. 75, Ex. 1, at 27) (stating that "[Bridas'] [approximately 7% discount] rate is too low and does not adequately reflect risk and the provisions of the contract."). In sum, the Court finds that the Defendants' motions to vacate the Third Partial Award for manifest disregard of the law is **DENIED**.

C.

In the Final Award issued on January 26, 2001, the arbitrators acknowledged that they erred in "determining the total [damages] payable to [Bridas in the Third Partial Award] because [they] d[id] not include 50% of the amount of an arbitration award made in favour of JV Keimir against the Turkmenbashi Refinery [on November 30, 1997]." (Instrument No. 90, Ex. A, at 2). Accordingly, pursuant to Bridas' request for an award of further damages, the arbitrators awarded Bridas 50% of the Refinery Award at a 10% simple interest rate. Although the Defendants did not respond to Bridas' request for interest at a 10% rate, they argued that Bridas' request for further damages was time-barred. Following the rendering of the Final Award, the Defendants sought modification of the interest rate, but were denied relief.

In this motion to modify or vacate the Final Award, the Defendants argue that the arbitrators erred in assigning the 10% interest rate to Bridas' share of the Refinery Award. According to the Defendants, the arbitrators should have only granted a 5.48% compound interest rate as was originally provided by the Refinery Award arbitrator in November 1997 and later confirmed by Judge Lake in May 1999. (Instrument No. 90, at 3-7). According to the Defendants, the arbitrators made an "evident material miscalculation of the figures" by assigning the 10% simple interest rate. The Defendants contend that the "erroneous interest rate . . . first appeared as a mistake in Bridas's request to alter the [Third Partial Award] to include the Refinery Award." (*Id.*). They

maintain that the arbitrators erroneously assumed that by "accepting the principal amount of the Refinery Award and making no immediate comment on the interest rate, [the Defendants] 'conceded' the elevated 10% interest rate, which [Bridas] introduced long after the Refinery Award was rendered and confirmed." (*Id.* at 5-6).

As previously discussed, the Court may modify or correct an arbitration award under section 11(a) of the FAA "[w]here there was an evident material miscalculation of figures." 9 U.S.C. § 11(a) (2001). It is generally used to correct clerical and other obvious errors. *See Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1284 (5th Cir. 1994). Because the scope of review under section 11 is "extremely limited," id., the award will not be vacated if it is "rationally inferable from the facts before the arbitrator[s]." *Valentine*, 981 F.2d at 214.

The Court finds that the arbitrators' decision to award a 10% simple interest rate, instead of the 5.48% compound interest rate provided in the November 1997 Refinery Award, should not be vacated or modified because it is "rationally inferable from the facts before the arbitrator[s]." *Id.* First, although the Defendants now argue that the arbitrators' ruling contradicts the earlier interest rate ruling by the Refinery Award arbitrator, the facts before the arbitrators indicate that the Defendants agreed in February 2000 that 50% of the Refinery Award would be included in the quantum payable to Bridas in exchange for Bridas' abandonment of any "further right, title or interest to the award." (Instrument No. 90, Ex. E, at 2). Accordingly, given the parties' agreement by February 2000 that 50% of the Refinery Award would now become part of the award in the presently disputed arbitration, it is a rational inference that the calculation of the 50% share would no longer be subject to the strictures of the November 1997 Refinery Award arbitration, but instead be computed by the present arbitration's rulings.

Second, the Defendants complain that the arbitrators unwittingly erred in granting the 10% interest rate because "it first appeared as a mistake in Bridas's request to alter the [Third Partial Award] . . . [even though] the judicially confirmed rate of 5.48% was well known to all the parties and set forth in the calculations attached to the same submission." (Instrument No. 90, at 4). In Bridas' request for further damages in November 2000, it noted that the parties were in dispute over the exact amount that constituted a 50% share of the Refinery Award. Whereas Bridas believed that $28,446,181 represented 50% at a 5.48% interest rate calculated as of January 31, 2000, the Defendants had previously argued in a February 2000 hearing that 50% instead totaled $28,423,000. Given that the parties' figures differed by only about $23,000, Bridas conceded the amount and requested of the arbitrators in November 2000 the sum quoted by the Defendants. (Instrument No. 90, Ex. G, at 5).

Consequently, the arbitrators granted to Bridas $28,423,000 and 10% interest from January 31, 2000, until payment. Although the Defendants characterize Bridas' use of the 5.48% interest rate to bring the Refinery Award current through January 31, 2000, as an "inexplicable slip," (id. at 5), and thus demonstrating Bridas' contradictory and fallacious reasoning, the facts show that the Defendants agreed earlier in their motion that "the principal amount of [Bridas'] share of the Refinery Award as of January 31, 2000, is not in dispute." (*Id.* at 3).

Third, the Defendants argue that the arbitrators mistakenly assumed that the Defendants conceded the 10% interest rate. (Instrument No. 90, at 5). According to the Defendants, there was no concession of the interest rate because "there [was no] basis for failing to correct such an obvious error." (*Id.* at 6). Even assuming as true that the Defendants did not concede Bridas' request for the 10% interest rate as was granted in the other partial awards, they

nevertheless failed to contest the interest rate until after the Final Award was rendered. Moreover, despite the Defendants' repeated charge that the arbitrators "made no [] attempt to justify the near-doubling of the interest rate from that determined in the Refinery Award," (id.), and that they "cited no basis for awarding Bridas more than its half of the Refinery Award," (id. at 4), "[a]rbitrators need not provide reasons for their award." *Valentine*, 981 F.2d at 214; *see also Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (holding that "[f]irst and most fundamentally, an arbitrator is simply not required to state the reasons for his decision").

The Defendants have not demonstrated that the arbitrators made an "evident material miscalculation" of figures by rendering a 10% simple interest rate. In rejecting the Defendants' request to correct the Final Award, the arbitrators stated that they "took note of and considered the rate of interest sought by [Bridas]." (Instrument No. 90, Ex. E, at 3). The arbitrators concluded that "[i]n the absence of any comment on the matter by the [Defendants], the arbitrators did not consider it appropriate to depart from the [interest rate] term[] [requested] by [Bridas]." (*Id.*). Additionally, even the dissenting arbitrator, who argued that "no part of the [Refinery] [A]ward should have been included in the Final Award," acknowledged that "the request to reduce the rate of interest from 10% to 5.48% compounded annually . . . cannot be regarded as requesting correction of 'a clerical, computational, or typographical error' in the Final Award." (*Id.*, Ex. F, at 1). The request to vacate or modify the Final Award would require the Court to delve into the merits of the controversy. However, "[t]his is not the sort of review permitted under § 11(a) . . . [because it would] reach far beyond the scope of judicial review granted under the Federal Arbitration Act." *Armada*, 2000 WL 60200, at *10.

The Defendants additionally assert that Bridas' request for further damages was time-barred under the Texas International Arbitration Act ("TIAA"). (Instrument No. 90, at 3 n.2). Under the TIAA, a request to "correct in the award a computation, clerical, or typographical error or a similar error" must be made no later than the 30th day after the date of receipt of the arbitration award. Tex. Civ. Prac. & Rem. Code § 172.147(a)(1) (Vernon Supp. 2001). However, the TIAA also provides that "[t]he arbitration panel may, if necessary, extend the period within which it may make a correction, given an interpretation, or make an additional award." Tex. Civ. Prac. & Rem. Code § 172.149 (Vernon Supp. 2001).

In this case, the Third Partial Award was received by the parties on approximately September 27, 2000. (Instrument No. 90, at 3 n.2). Bridas' request to correct the Third Partial Award was submitted on November 27, 2000. (*Id.*, Ex. G). However, the arbitrators specifically ruled in the Third Partial Award that they "retain jurisdiction to deal with all questions relating to the interpretation and implementation of the [] award" and that "[i]f their further assistance were required, [the arbitrators] are to be so notified within 60 days of the date of the partial award." (*Id.*, Ex. A, at 1). Bridas maintains that the time limit was changed such that November 27, 2000, became the last day to submit requests. (*Id.*, Ex. G, at 1). In any event, the arbitrators determined in the Final Award that Bridas' request pertained to a "calculation error" and ruled that "[t]he effluction [sic] of time is not a bar." (*Id.*, Ex. A, at 3).

The Court finds that Bridas' request for correction of the Third Partial Award was not untimely under the TIAA. Additionally, the arbitrators specifically permitted the parties more than the 30-day period provided by the TIAA to make submissions. Even assuming the arbitrators erred in extending the submission duration, "a mistake of fact or misinterpretation of law by an arbitrator provides insufficient

grounds for the modification of an award." *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 194 (4th Cir. 1998). Accordingly, the Defendants' motion to vacate or modify the Final Award is **DENIED**.

D.

Although this lawsuit was originally brought by Bridas as an application for confirmation of the First Partial Award, it has since withdrawn its application, as well as its subsequent motion for confirmation of the Second Partial Award. (Instrument No. 46, Ex. A, at 2). Under the FAA, "[i]f a court reviewing an arbitration award . . . does not vacate or modify the arbitration award, the arbitration award is conclusive as to the rights of the parties." *McClelland v. Azrilyan*, 31 F. Supp. 2d 707, 713 (W.D. Mo. 1998) (citing *Americas Ins. Co. v. Seagull Compania Naviera*, 774 F.2d 64, 67 (2d Cir. 1985)); *see also Denver and Rio Grande W. R.R. Co. v. Union Pacific R.R. Co.*, No. 93-1011-PFK, 1995 WL 41682, *6 (D. Kan. Jan. 25, 1995) (holding that the "three options [] available to the parties and the court . . . are confirmation, vacation, and modification").

Because the Court rejects the Defendants' requests to vacate or otherwise modify the First Partial Award, the Third Partial Award, or the Final Award, "it [i]s obvious the only option available to the parties and the court [i]s to confirm the award." *Denver and Rio Grande*, 1995 WL 41682, at *7. Accordingly, the Court finds that the arbitration awards in the case are **CONFIRMED**.

IV.

Based on the foregoing, Turkmenistan's motion to vacate and refuse confirmation of the First Partial Award **(Instrument No. 13)** is **DENIED**; Turkmenistan's conditional motion to vacate or modify the Third Partial Award **(Instrument No. 71)** is **DENIED**; Turkmenneft's motion to vacate or modify the Third Partial Award

(Instrument No. 72) is **DENIED**; and, the Defendants' motion to vacate or modify the Final Award **(Instrument No. 90)** is **DENIED**.

Additionally, the arbitration awards are **CONFIRMED**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 30th day of September, 2001, at Houston, Texas.

/s/
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20929

**Bridas SAPIC; Bridas Energy International Ltd.;
Intercontinental Oil & Gas Ventures Ltd.;
Bridas Corporation, Plaintiffs-Appellees,**

v.

**Government of Turkmenistan; et al.,
Defendants**

**Government of Turkmenistan; State Concern
Turkmenneft, Defendants-Appellants.**

**Appeals from the United States District Court for the
Southern District of Texas, Houston**

**ON PETITION FOR REHEARING AND REHEARING
EN BANC**

Opinion 9/9/03

Before DAVIS and BENAVIDES, Circuit Judges, and RESTANI*, District Judge.

PER CURIAM:

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* Judge, U.S. Court of International Trade, sitting by designation.

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

Clerk's Note:
See FRAP and Local Rules 41 for Stay of the Mandate

Supreme Court, U.S.
FILED
FEB 17 2004
OFFICE OF THE CLERK

No. 03-1018

In The
Supreme Court of the United States

STATE CONCERN TURKMENNEFT,

Petitioner,

v.

BRIDAS S.A.P.I.C.; BRIDAS ENERGY INTERNATIONAL, LTD.; INTERCONTINENTAL OIL & GAS VENTURES, LTD.; BRIDAS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in applying a manifest disregard of law test that asked whether "the arbitrator understood the existence of a governing legal principle but decided to ignore it."

2. Whether an arbitration panel's factual determination of a discount rate was in "manifest disregard of law," when Petitioner cannot cite any governing law that the panel disregarded.

STATEMENT PURSUANT TO RULE 29.6

Respondents' parent companies are Ambas Holding Limited; Bridas Energy Investments Ltd. (also a Respondent); Energy Holdings International Ltd.; Associated Petroleum Investors Ltd.; Intercontinental Investments Holding Ltd.; and Intercontinental Energy Investors Ltd. No publicly held company owns 10% of Respondents' stock.

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OPPOSITION TO PETITION FOR CERTIORARI

Respondents Bridas S.A.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil & Gas Ventures Ltd., and Bridas Corporation (collectively, "Bridas") respectfully oppose the petition filed by State Concern Turkmenneft for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 345 F.3d 347 (5th Cir. 2003). The opinion of the district court is unreported.

COUNTERSTATEMENT OF THE CASE

A. Introduction.

Petitioner urges this Court to grant review to resolve a purported circuit split regarding the meaning of the manifest disregard of law standard, a nonstatutory ground for vacatur introduced by this Court in *Wilko v. Swan*, 346 U.S. 427 (1953), *reversed on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), and confirmed in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).[1] Petitioner's request should be denied simply because this issue was neither pressed nor ruled on below.

Further, all circuits, with one exception, apply the same, traditional test: an arbitral award will not be vacated for manifest disregard of law unless it is clear

[1] Arbitral awards are very rarely vacated under this standard. Of the over 300 published cases we have found applying the manifest disregard standard, fewer than 10% have ordered vacatur on this ground.

from the record that "the arbitrator understood the existence of a governing legal principle but decided to ignore it." *Williams v. Cigna Financ. Advisors, Inc.*, 197 F.3d 752, 762 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000).

The only circuit that applies a different test is the Seventh Circuit, which recently introduced a new, extremely narrow standard: an arbitral decision is in manifest disregard of the law only when the arbitrator's award actually orders the parties to violate the law. *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577 (7th Cir. 2001). While the Seventh Circuit is thus at odds with the rest of the circuits, this conflict is irrelevant here because Petitioner could not possibly prevail under this narrower standard of review. Petitioner seeks a broader standard than the one applied here.

Petitioner also argues that the Fifth Circuit's standard is more stringent than the remaining circuits' because it includes a second hurdle: even if an award is in manifest disregard of law, the Fifth Circuit has held it will not be vacated unless "significant injustice" would result. *Williams*, 197 F.3d at 762. But even if the Fifth Circuit's test were more onerous, that would not matter here: the Fifth Circuit did not reach the second hurdle because Petitioner failed to meet the first, traditional hurdle. Accordingly, even if this Court rejected the second hurdle, that would not change the outcome in this case.

Because Petitioner fails to show that it could have prevailed under any other circuit's manifest disregard test, the Petition poses an abstract question rather than a live case or controversy.

Petitioner also asks this Court to review the Fifth Circuit's application of the manifest disregard standard to the arbitrators' selection of a discount rate, which it claims was erroneous. This request should be denied because this Court does not review factual errors, and because no court reviews an arbitration panel's factual findings. In any event, as the Fifth Circuit properly held, Petitioner cannot

possibly show that the arbitrators manifestly disregarded governing law, because they are unable to point to any law that the arbitration panel disregarded in estimating a discount rate.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

B. The Agreement.

In 1993, Bridas entered into a joint venture agreement ("JVA") with a Turkmenian party formed and owned by the government of Turkmenistan ("Turkmenistan") and designated to represent Turkmenistan's interest in the joint venture. Over time, Turkmenistan replaced this party with a number of entities, the final one being Petitioner Turkmenneft. (Pet. App. 30a.) The parties formed a joint venture entity ("JVK") to develop oil and gas fields in southwestern Turkmenistan. (*Id.*)

In 1995, after Bridas had invested more than $200 million in JVK, Turkmenistan ordered Bridas to suspend work and prohibited Bridas from importing or exporting any gas or oil. (Pet. App. 31a; RE5:4697.[2]) A few months later, Turkmenistan and the Turkmenian party acted jointly to take over the JVK fields and oust Bridas from the joint venture. [BRE6:12630-12631.] In response, Bridas initiated arbitral proceedings against Turkmenistan and the Turkmenian party before the International Chamber of Commerce ("ICC"). (Pet. App. 31a.)[3]

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[2] References to the record are set forth in the same manner as in Bridas' brief in the court of appeals. In this brief, we use the following citation forms to the record below: "R" refers to the Record filed in the district court; "RE" refers to petitioner's Record Excerpts in the court of appeals, and "BRE" refers to Bridas' Record Excerpts in the court of appeals.

[3] The arbitration originally named as respondents the Government of Turkmenistan, or Turkmenistan, or the State of Turkmenistan, and

(Continued on following page)

C. Arbitral History.

Arbitration proceeded before a panel of three arbitrators over four years. The proceedings included 19 days of hearings, extensive legal briefing, numerous expert reports, and voluminous testimony concerning damages. (Pet. App. 32a.) The arbitrators issued four partial awards, applying English law pursuant to the arbitral provisions of the JVA.

In the first partial award, a majority of the arbitrators concluded that both Turkmenistan and the Turkmenian parties had repudiated the JVA. The arbitrators also determined that damages should be measured by a loss of bargain standard, using a multi-factored analysis that used a 10.446% discount rate to calculate the present value of Bridas' future losses.[4] (Pet. App. 32a.)

Contrary to Petitioner's representation that "[t]he arbitrators had heard no expert or other testimony supporting the rate they selected" (Pet. 20), the panel reached its discount rate decision only after considering the testimony of both sides' experts. As the panel explained:

> Both parties adduced evidence and made submissions concerning the appropriate discount rate to be used to assess the present value of the future income stream. [Bridas'] position was that 7.5% is appropriate. The [Turkmenian parties] contended for 19.1%. [Their] analysis was based on a fair market value approach which we reject, but in our opinion [Bridas'] rate is too low and does not adequately reflect risk and the

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the Ministry of Oil and Gas of Turkmenistan and Concern Balkannebitgazsenagat (then the Turkmenian party). The arbitrators subsequently added the newly-formed State Concern Turkmenneft, Petitioner here, as a respondent in the arbitration.

[4] The dissenting member of the panel would have used a discount rate of 15%. [R8:76.3:4560-4559.]

> provisions of the contract. The arbitrators conclude that a rate of 10.446%, which is the rate charged by [Bridas] to the [Turkmenian parties] on [Bridas'] FPC account, in the circumstances of this case reflects the reality of the factual context as of June 30, 1997, the notional date for the receipt of money, and the terms of the JV Agreement.

[RE5:4706.]

The methodology selected by the panel considered numerous risks, including those associated with initiating gas and oil production, and transporting gas and oil to market, as well as inevitable fluctuations in the prices of oil and gas and in interest rates. The discount rate chosen by the panel was supported by the testimony of one of the experts for the Turkmenian parties, who estimated rates between 9.6% and 12.6%, encompassing the 10.446% rate selected by the arbitrators. [R11:75.24:3951.]

In short, the arbitrators chose a discount rate between the rates urged by each side's experts and arrived at a rate within the range urged by the parties.

The Turkmenian parties disputed the arbitrators' determination of the discount rate, arguing it was too low. [RE7:4596.] The panel considered and rejected their arguments, explaining in its subsequent partial award that:

> Determination of the input numbers for a calculation of damages for loss of bargain is a question of fact which is a matter of judgment based on the evidence. . . . Although they consider it to be too high, the [Turkmenian parties] do not challenge the arbitrators' conclusion in the First Partial Award concerning the discount factor, but the [Turkmenian parties] say that it is too low and should be revised upward. . . .
>
> Having considered the evidence adduced and submissions made at the January and February, 2000 proceeding, the arbitrators see no reason to depart from their earlier assessment of the

> appropriate discount factor. It was higher than the non-risk discount factor advanced initially by [Bridas] and takes into account the various risks referred to by the parties in the evidence, including those that derive from a consideration of the production plan insofar as it delays or eliminates volumes of production.

[RE7:4594-95.]

The Turkmenian parties challenged the discount rate a third time before the panel issued its final award. The panel considered their arguments and once again rejected them:

> The arbitrators are criticized for referring to the non-risk rate advanced by [Bridas], but this merely illustrates the fact that the arbitrators were alive to the fact that risk did have to be taken into account and that they did so. Their judgment was that 10.446% was an appropriate rate.
>
> The [Turkmenian parties] repeat arguments concerning the long-term equity rate that were canvassed thoroughly previously. They did not agree with the rate expressed in the First Partial Award and disagree with it now. The arbitrators considered all submissions concerning the discount rate and the widely disparate positions of the parties. The resulting rate was and remains their judgment of the rate that is appropriate in the circumstances of this case.
>
> The conclusion [as to the present value of Bridas' lost income stream] is rooted in the positions taken by the parties, some of which were accepted and some of which were not, a consideration of the mathematical relationship which is revealed by a consideration of those positions and the opinion of the arbitrators as to what was a fair assessment of the present value. The resulting number is not a mathematical calculation. It was

> neither determined nor expressed as such. It is a conclusion of judgment that flows out of the arbitrators' consideration of the positions advanced by the parties. Those positions were themselves based on the estimates of experts, which derived from their judgments of a number of factors. The [Turkmenian parties] would have the arbitrators bound to accept completely the judgment of one set of experts and to reject completely the judgment of the other set of experts. The arbitrators were not required to do so and did not do so.

[RE9:5231-33.]

The panel thus repeatedly considered each side's evidence, expert testimony, and arguments, and provided a reasoned explanation for its rejection of Petitioner's arguments concerning the methodology it used to determine the discount rate.

D. Judicial History.

1. District Court Proceedings.

The Turkmenian parties asked the district court to vacate the award based, *inter alia*, on the arbitrators' selection of a 10.446% discount rate. They argued that the arbitrators had violated the FAA by failing to issue a reasoned award, by applying equitable rather than legal principles, by awarding punitive damages, by making a material miscalculation, and by "other misbehavior." (Pet. App. 50a-62a.) They also argued that the arbitrators' award was in "manifest disregard of the law." (Pet. App. 62a-64a.) The district court rejected all these grounds for vacatur.

The district court found that the Turkmenian parties failed to show the arbitrators' choice of a discount rate was in manifest disregard of law because they did not cite

> any "law" which the arbitrators manifestly disregarded other than a terse contention that the arbitrators "[r]endered an award far in

> excess of the actual damages permitted by the English law of contracts by failing to adjust for the probability that projected revenues would not be realized." The [Turkmenian parties'] vague reference to the "English law of contracts" [was] not otherwise reinforced with analysis in their motions.

(Pet. App. 63a, quoting Instr. No. 72, at 46.) The court further observed that the award demonstrated that the arbitrators *had* considered the issue of risk, as required by English law. (Pet. App. 63a-64a.)

2. Appellate Proceedings.

The Fifth Circuit Court of Appeals affirmed the district court's ruling upholding the arbitrators' selection of a discount rate.[5]

The court rejected the Turkmenian parties' argument that the panel had selected a discount rate in manifest disregard of law, *i.e.*, that "'the arbitrator[s] understood the existence of a governing legal principle but decided to ignore it.'" (Pet. App. 23a, quoting *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003).) The court cited the following test from *Williams v. Cigna Financ. Advisors, Inc.*, 197 F.3d 752, 762 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000):

> First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld.
>
> Second, where on the basis of the information available to the court it is manifest that the

[5] The court reversed the district court's ruling that Turkmenistan was a party to the JVA, and remanded for further proceedings on this issue, which is not relevant to the questions raised by the Petition for Certiorari.

> arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between the parties.

(Pet. App. 24a.)

The court determined that the Turkmenian parties failed to meet the first hurdle. Specifically, the court rejected the Turkmenian parties' argument that the arbitrators manifestly disregarded the law by "downplay[ing] or ignor[ing] market forces when setting the discount rate." (Pet. App. 25a.) The court first observed that selection of a discount factor is "a question of fact to be determined by the trier of fact." (Pet. App. 25a-26a.) The court next observed that the Turkmenian parties had failed to identify any law presented to the arbitrators that they disregarded: "[The Turkmenian parties] cite[] no English law that compels the use of a particular discount rate, or establishes a methodology for establishing the same." (Pet. App. 26a (footnote omitted).) Finally, the court observed that the arbitrators had "considered a variety of evidence and considered the factors that it deemed most appropriate for this particular income stream: the risk inherent in the venture, potential inflation, and the time-value of money." (*Id.*) Accordingly, the court held, "there is simply no merit to [the Turkmenian parties'] assertion that the arbitrators' selected discount rate cannot, as a matter of law, possibly establish present-value damages equivalent to the stream of revenues projected to have been lost as a result of the breach," (*id.*) and declined the Turkmenian parties' "request[] that this court second-guess the arbitrators' determination [of the discount rate]." (Pet. App. 25a.)

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT SPLIT AFFECTING THIS CASE.

A. Petitioner Waived Its Claim that the Courts Are Split on the Meaning of Manifest Disregard of Law.

Petitioner's claim that the circuits are split was not raised or addressed in the court of appeals or the district court. Indeed, Petitioner objected to Respondent's citation of other circuits' articulations of the manifest disregard standard, and insisted the court use the Fifth Circuit's version. (Turkmenneft's reply brief at 6-7.)

Petitioner's oblique and perfunctory reference in its Petition for rehearing en banc to "confusion" about the standard does not preserve the issue. The petition was summarily denied, and the issue thus never reached by the court. *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (declining to reach an issue that "was not raised or briefed below."); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below."); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."). The Petition should be denied for this reason alone. We nevertheless address the merits in an abundance of caution.

B. Petitioner Misconstrues the Law Concerning the Meaning of Manifest Disregard.

Petitioner contends that review is warranted because the circuit courts are "sharply divided" over the meaning and scope of the "manifest disregard of law" standard of review. (Pet. 2, 7-14.) Petitioner misconstrues the law.

Petitioner argues that commentators have "bemoaned" a "longstanding and apparently intractable conflict" among circuit courts, citing a handful of student

notes[6] and a 1996 law review article by Stephen L. Hayford, *Law in Disarray: Judicial Standards for Manifest Disregard of the Law*, 30 Ga. L. Rev. 731, 764-778 (1996). (Pet. 8-9.) Petitioner quotes a sentence from Professor Hayford's lengthy (110 page) article professing "concern" over the "oblique" reference to manifest disregard in this Court's opinion in *Wilko*, 346 U.S. 427, and "the subsequent lack of guidance from the Court as to its proper meaning and effect." (Pet. 8, quoting Hayford, *supra*, at 811-12.) But this cursory statement appears in a section of the article discussing the legitimacy of the manifest disregard standard on policy grounds.

In the section of his article discussing the meaning of the standard as applied by the circuits, Professor Hayford states that, while courts were at that time (1996) divided over whether to *adopt* the standard,[7] the courts using the

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[6] None of the notes support Petitioner's argument, although they purport to discuss confusion among the circuits. All four contain limited analysis of manifest disregard cases, cite to one another to support the thesis that confusion exists, and put a lot of emphasis on *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), which, as we discuss *infra*, contains loose language that has since been disavowed by the Second Circuit. *GMS Group, LLC v. Benderson*, 326 F.3d 75, 79 (2d Cir. 2003) (explaining that, in *Halligan*, "we could only conclude that [the arbitrators] had disregarded [the law], as any other explanation would strain credulity given the quantity and quality of evidence. . . . We reached this conclusion applying the traditional manifest disregard standard," and citing the following intervening decisions applying the traditional test: *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1215 (2d Cir. 2002); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002); *Pike v. Freeman*, 266 F.3d 78, 86 (2d Cir. 2001)).

[7] The split over whether to adopt the standard has since been resolved. After this Court overruled *Wilko* on other grounds in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), some circuit courts concluded that the manifest disregard standard was no longer viable, and declined to apply it. *See, e.g., Williams*, 197 F.3d at 757-58. A few years after *Rodriguez*, however, this Court confirmed the viability of the manifest disregard standard in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). In

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standard were in agreement over its *meaning*: "the case law indicates a general agreement among the circuit courts as to the meaning of the 'manifest disregard' of the law ground." Hayford, *supra*, at 776; *see also Advest, Inc. v. McCarthy*, 914 F.2d 6, 9-10 (1st Cir. 1990) (observing that the circuit courts that had adopted the manifest disregard standard applied essentially the same test although they phrased it differently).[8]

Professor Hayford's article thus does not support Petitioner's argument that there is a circuit split as to the meaning of the standard.

Further, Professor Hayford confirms this lack of conflict in a more recent article (which Petitioner does not cite), stating there is now "consensus among the federal appeals courts as to the general nature of the judicial inquiry called for in applying [the manifest disregard] ground for vacatur." Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 Geo. Wash. L. Rev. 443, 467 (1998). "[T]he federal

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the wake of that decision, the circuit courts uniformly adopted the manifest disregard standard. *E.g., Williams*, 197 F.3d at 758-59 (discussing its decision to adopt manifest disregard standard in light of "*First Options*' approval of the standard," and listing cases from other circuits having done the same).

[8] As the *Advest* court put it,

> [t]his standard of judicial review has taken on various hues and colorations in its formulations in this, and other, circuits. . . . Although the differences in phraseology have caused a modicum of confusion, we deem them insignificant. We regard the standard of review undergirding these various formulations as identical, no matter how pleochroic their shadings and what "terms of art have been employed to ensure that the arbitrator's decision relies on his interpretation of the contract as contrasted with his own beliefs of fairness and justice. However nattily wrapped, the packages are fungible." 914 F.2d at 9-10 (citations omitted).

courts of appeals [now] unfailingly commence their analysis with an incantation of the two-step . . . standard," *i.e.*, (1) the arbitrator was aware of a well-defined and clearly governing legal principle; and (2) the arbitrator nevertheless failed to apply it. *Id.* at 468.[9]

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[9] Numerous cases, including many just last year, confirm this. *See, e.g., Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990) (manifest disregard exists when the law is "so clear and the arbitrators' award so irreconcilable with it that the panel must have disregarded the law and embarked on a flight of fancy"); *Bull HN Info. Sys. v. Hutson*, 229 F.3d 321, 331 (1st Cir. 2000) (citing *Advest*); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003) ("A court will vacate an arbitral award on this ground only if '[it] . . . find[s] both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'") (citation omitted); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003) (court may vacate an arbitrator's decision when it "'evidence[s] a manifest disregard for the law rather than an erroneous interpretation of the law.'") (quoting *Local 863 Int'l Brotherhood of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 534 (3d Cir. 1985) ("'the arbitrator's refusal to accept the valid, unappealed judgment of a court of this state . . . constituted manifest disregard for the law.'") (citation omitted); *Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991) (award may only be reversed "'when arbitrators understand and correctly state the law, but proceed to disregard the same.'") (citation omitted); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003) ("Judicial inquiry under the 'manifest disregard' standard is . . . extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable."); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 847 (6th Cir. 2003) ("An award is in manifest disregard if '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.'") (citations omitted); *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003) ("An arbitrator's award 'manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it.'") (citation omitted); *Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1133-35 (9th Cir. 2003) (discussing "traditional manifest disregard of the law standard"; "our task is to determine whether the arbitrators could have made the same punitive damages award without manifestly disregarding New York law"); *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir.

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Petitioner also cites a D.C. Circuit case, *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), in support of its assertion that the circuit courts "repeatedly have recognized that they are divided over the meaning and scope of the manifest disregard of law standard and that guidance from this Court is required." (Pet. 7-8.) In *Cole*, however, the court merely observed that the "circuits have adopted various formulations" of the standard, and proceeded to consider how to apply the standard in the context of collective bargaining agreements. *Cole*, 105 F.3d at 1486-87 (stating that "in this statutory context, the 'manifest disregard of law' standard must be defined in light of the bases underlying the Court's decisions in *Gilmer*-type cases," *i.e.*, "'to ensure that arbitrators comply with the requirements of the statute'") (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). The D.C. Circuit has since confirmed it follows the traditional test. *E.g.*, *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 706 (D.C. Cir. 2001) (holding that "to modify or vacate an award on this [manifest disregard] ground, a court must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it

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2001) ("'manifest disregard of the law clearly means more than error or misunderstanding with respect to the law,' and it requires a 'willful inattentiveness to the governing law'") (citation omitted); *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1337 (11th Cir. 2002) ("'to manifestly disregard the law, one must be conscious of the law and deliberately ignore it.'") (citations omitted); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 706 (D.C. Cir. 2001) ("to modify or vacate an award on this ground, a court must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.") (citations omitted); *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1366 (Fed. Cir. 2001) ("the district court's holding, that the arbitrators' written decision is 'adequate and certainly not "completely irrational" or in "manifest disregard of the law,"' clearly recognizes that the decision is not the product of the arbitrators' gross misconduct.").

altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." (Citations omitted.)

Petitioner also observes that the Seventh Circuit recently adopted a new, very stringent standard for manifest disregard: "an arbitral decision is in manifest disregard of the law only when the arbitrator's award actually orders the parties to violate the law." *Butler Mfg. Co. v. USW*, 336 F.3d 629, 636 (7th Cir. 2003) (citing *Watts*, 248 F.3d at 580). (Pet. 8.) This unique standard does not provide a ground for review, however, because it would not change the outcome in this case: Petitioner has not argued, and cannot argue, that the arbitrators ordered the parties to violate the law here.

Petitioner also claims that the Fourth Circuit uses a standard narrower than other circuits. According to Petitioner, the Fourth Circuit "allows reviewing courts to develop their own rationale for confirming an award even if the arbitrator's rationale cannot be reconciled with the governing law." (Pet. 9.) But the case on which Petitioner relies, *Apex Plumbing Supply Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir.), *cert. denied*, 525 U.S. 876 (1998), is not a manifest disregard case at all. The issue was not raised by either party. Petitioner quotes dicta from a footnote explaining why courts interpret arbitral awards narrowly. *Apex* does not set out the manifest disregard standard, to which it refers only in passing, but it does cite *Upshur Coals Corp. v. United Mine Workers, Dist. 31*, 933 F.2d 225 (4th Cir. 1991). *Upshur*, however, adopts the traditional test, *i.e.*, an award "may only be reversed 'when arbitrators understand and correctly state the law, but proceed to disregard the same.'" 933 F.2d at 229 (citations omitted). Further, even if the Fourth Circuit did apply a narrower version of the manifest disregard standard, that would not help Petitioner, who requires a broader standard to have any hope of prevailing.

Petitioner then points to the Second Circuit's decision in *Hardy v. Walsh Manning Sec., L.L.C.*, 341 F.3d 126 (2d

Cir. 2003). (Pet. 10.) Petitioner acknowledges that the Second Circuit "consistently reiterates" the traditional standard, authorizing an award to be vacated for manifest disregard only if (1) the arbitrators "'knew of a governing legal principle yet refused to apply it or ignored it altogether,'" and (2) the principle was "'well-defined, explicit and clearly applicable.'" (Pet. 10, quoting *Hardy*, 341 F.3d at 129.) But Petitioner argues that "*in practice*[,] [the Second Circuit] is sometimes less restrictive." (*Id.* (emphasis added).) To support this contention, Petitioner quotes *Hardy*'s statement that the award "'contain[ed] a fundamental mistake of law,'" and claims that this is the standard the court used to decide the case. (*Id.*, quoting *Hardy*, 341 F.3d at 133.) Petitioner misstates the result in *Hardy*.

The Second Circuit did not vacate the award in *Hardy* or hold that a "fundamental mistake of law" would be a ground for doing so. To the contrary, a majority of the court in *Hardy* held that the arbitral panel *may* have acted in manifest disregard of the law by disregarding governing legal principles of *respondeat superior* of which it was clearly aware. 341 F.3d at 130-31. The majority remanded the case to the arbitral panel to clarify whether it had disregarded the principle of *respondeat superior*. *Id.* at 133-34 (citations omitted).

The majority also held that the panel's award was based on a mistake of law, but refused to vacate it on that ground, because "[v]oiding an award [on the basis of manifest disregard] 'requires more than a mistake of law or a clear error of fact finding.'" *Id.* at 133. *Hardy* thus stated and applied the well-established standard for manifest disregard.[10]

[10] Indeed, the Second Circuit has stated and applied the traditional test in about 50 cases. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003) ("since 1960 we have vacated some part or all of an arbitral award for manifest disregard in

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Petitioner then turns to the First Circuit, making the unremarkable observation that the First Circuit's application of manifest disregard conflicts with the Seventh Circuit's new, *sui generis* standard. (Pet. at 10-11.) As discussed above, the Seventh Circuit standard conflicts with that of all other circuit courts because it has adopted an approach that virtually abrogates manifest disregard as a ground for vacatur, while the other circuits continue to apply the traditional test. But, as noted above, the Seventh Circuit standard is irrelevant here because no party argues it should be adopted, since it would not change the outcome in this case.

Petitioner's effort to show that the First Circuit's approach conflicts with the traditional test is also unavailing. (*See* Pet. at 10-11.) Petitioner cites *Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234 (1st Cir. 1995), to support its argument that the First Circuit reviews arbitral awards for evidentiary error. But the *Prudential* court both stated and applied the traditional test for manifest disregard. *Id.* at 239 (holding that "arbitration awards are subject to review [for manifest disregard of law] 'where it is clear from the record that the arbitrator recognized the applicable law – and then ignored it' ") (quoting *Advest*, 914 F.2d at 9); *see id.* at 240-41 (refusing to revisit the merits of appellant's factual contentions).

The language quoted by Petitioner was taken by the *Prudential* court from the First Circuit's 1990 opinion in *Advest*. Before stating the traditional test for manifest disregard, the *Advest* court reviewed earlier cases stating (without invoking "manifest disregard") that, "[i]n the main, a successful challenge to an arbitration award, apart from [FAA] section 10, depends upon the challenger's ability to show that the award is '(1) unfounded in

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. . . four out of at least 48 cases where we applied the [manifest disregard] standard") (quoted in *Hardy*, 341 F.3d at 130).

reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.' [Citations]." 914 F.2d at 8 (quoted in *Prudential*, 72 F.3d at 238.) "Put differently," the *Advest* court went on to say, "'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' *a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision.* [Citations.]." *Id.* at 8 (emphasis added). The *Advest* court concluded that the definitions of manifest disregard standard stated by different circuits were essentially "fungible." *Id.* at 10, *see* n.9, *supra*.

Read in the context of the *Advest* and *Prudential* decisions, the language quoted by Petitioner does not begin to suggest, as Petitioner claims, that the First Circuit uses a "fundamental mistake" standard, a "clear error" approach to fact-finding, or any other standard of review "rejected by other circuits." (Pet. 11.) Petitioner does not, because it cannot, cite any First Circuit decision applying the standards it attributes to that court.

Finally, Petitioner claims that the Fifth Circuit is stricter than some other circuits, *e.g.*, the Second Circuit, because it adds "an additional requirement" to the traditional test, "namely, that upholding the award would result in significant injustice." (Pet. 2; *see* Pet. 11, citing *Williams*, 197 F.3d at 762.[11]) Petitioner can point to no

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[11] *Williams* suggests that the following proposal "should prove helpful as a basis for articulating and applying the manifest disregard doctrine in the present context":

> First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld.

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Fifth Circuit case that has actually applied the "significant injustice" hurdle, but even assuming that the Fifth Circuit were to do so, the extra hurdle has no bearing on the decision reached here. In this case, the Fifth Circuit explicitly declined to reach the "significant injustice" hurdle because it had already concluded that Petitioner failed to clear the first, traditional hurdle, *i.e.*, Petitioner failed to show that the arbitrators manifestly acted contrary to governing law: "it is clear that [Petitioner] cannot satisfy the first prong of the manifest-disregard test. [Accordingly], we need not address the second." (Pet. App. 26a.) Thus, like the Seventh Circuit's standard, any difference between the Fifth Circuit's standard and that of other circuits is irrelevant to this case.

Petitioner makes a number of other groundless assertions in its effort to manufacture a relevant circuit split. First, Petitioner states the circuit courts are divided over whether the arbitrator's disregard must be intentional. (Pet. 11-12.) But none of the cases it cites supports this proposition. Indeed, all of the circuits that apply the test require an arbitrator's disregard of the law to be knowing or intentional. Whether or not they use the word "knowing" or "intentional," the circuit courts uniformly hold that an arbitrator's mistake or misinterpretation of the law does not constitute manifest disregard, which amounts to the same thing: the arbitrator's disregard of

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> Second, where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to relations between the parties.

197 F.3d at 762 (quoting Ian R. MacNeil et al., 4 FEDERAL ARBITRATION LAW § 40.7.2.6, at 40:95 (Supp. 1999) (footnote omitted)).

the law cannot be accidental but must be deliberate. *See* cases cited in n.9, *supra*.

Petitioner then cites *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), and *University Commons-Urbana, Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331 (11th Cir. 2002), to assert that courts are divided over "whether the absence of a written opinion precludes or supports manifest disregard[.]" (Pet. 12.) These cases are not in conflict. In *University Commons*, the court considered the appellant's manifest disregard argument, but determined that in the absence of a reasoned opinion, or "any clear rule of law that the arbitrators might have transgressed," it could not vacate the award on that ground. 304 F.3d at 1337-38. In *Halligan*, by contrast, the court vacated the award even though there was no reasoned opinion, because there was overwhelming evidence in the record that the arbitrators manifestly disregarded a governing principle of law. 148 F.3d at 203-04.

The Second Circuit has since clarified that, while *Halligan* contains some loose language, it was based on "the traditional manifest disregard of the law standard." *GMS Group, LLC v. Benderson*, 326 F.3d 75, 79 (2d Cir. 2003) (citing the following intervening decisions that apply the traditional test: *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1215 (2d Cir. 2002); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002); *Pike v. Freeman*, 266 F.3d 78, 86 (2d Cir. 2001).) In *Halligan*, the court explained, "we could only conclude that [the arbitrators] had disregarded [the law], as any other explanation would strain credulity given the quantity and quality of evidence. . . . We reached this conclusion applying the traditional manifest disregard standard." *Id.* The court further noted that its discussion in *Halligan* "was confined to the unique concerns at issue with employment discrimination claims." *Id.* In any event, even if there were a split on whether the absence of a written opinion precludes or supports a showing of manifest disregard, there is no such issue in this case, because the arbitrators issued a lengthy written opinion.

Petitioner trots out *Halligan* again when it disingenuously asserts that two circuit courts have invoked a "manifest disregard of the evidence" standard. (Pet. 12.) Neither *Halligan* nor the other case cited by Petitioner, *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997), support this proposition. As noted above, the Second Circuit has since disavowed the loose language in *Halligan* and confirmed that it uses the traditional test. *GMS*, 326 F.3d at 79. In *Montes*, the Eleventh Circuit vacated an arbitral award not on evidentiary grounds, as Petitioner claims, but because it was clear to the court that the arbitral panel had consciously disregarded applicable law. 128 F.3d at 1461-62; *see id.* at 1459 (counsel for the prevailing party urged the arbitrators to ignore the Fair Labor Standards Act, which undisputedly governed the dispute, because "'*in this case this law is not right.*'") (original emphasis). Further, the Ninth Circuit has recently noted that "[m]anifest disregard of the *facts* is not an independent ground for vacatur in this circuit [or] any other circuit[.]" *Coutee v. Barington Capital Group, L.*, 336 F.3d 1128, 1133 and n.5 (9th Cir. 2003) (citing *GMS*, 326 F.3d at 79) (emphasis added).

Petitioner also claims that the circuit courts are split because two cases ostensibly hold that manifest disregard applies when an arbitral award is at odds with "the plain language of the contract." (Pet. 12, citing *Wonderland Greyhound Park, Inc. v. Autotote Sales, Inc.*, 274 F.3d 34 (1st Cir. 2001), and *Missouri River Servs., Inc. v. Omaha Tribe*, 267 F.3d 848 (8th Cir. 2001).) As the Second Circuit explained in *Westerbeke*, 304 F.3d at 220-21, the "plain language" or "essence of the contract test" derives from section 301 of the Labor Management Relations Act, not the FAA, and is not applicable to commercial cases. (Citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). Respondents have carefully searched and found only one circuit court case that even arguably uses a "plain language of the contract" test for manifest disregard in the context of commercial arbitration, namely,

Wonderland, 274 F.3d 34. There, the First Circuit held manifest disregard exists when "it is clear from the record that the arbitrator recognized the applicable law but ignored it," *or* "the award is contrary to the plain language of the contract." *Id.* at 36. However, the court went on to apply the traditional test to conclude there was no manifest disregard of law. *Id.* at 36-38.

The other case cited by Petitioner, *Missouri River Servs., Inc. v. Omaha Tribe*, 267 F.3d 848 (8th Cir. 2001), does not define manifest disregard in terms of plain language of the contract. Rather, it cites the traditional test for manifest disregard (which it did not apply), and refers to the essence of the contract in defining an alternative common law ground – "irrationality" – for vacatur. *Id.* at 854. In any event, this issue is also irrelevant, because Petitioner has never alleged that the arbitrators' decision conflicts with the plain language of the contract here.

Finally, Petitioner resorts to citing state court of appeals cases differing over whether the FAA requires them to adopt the manifest disregard standard. (Pet. 12-13.) This federal preemption question is completely unrelated to the issue raised by Petitioner here, namely, how the federal courts apply the manifest disregard standard. Further, this Court does not review the opinions of lower state courts. *See* Stern & Gressman, SUPREME COURT PRACTICE (8th ed. 2002), § 3.11, p. 163 (citing cases).

In sum, Petitioner fails to show any conflict between the manifest disregard standards applied by the circuit courts, with the exception of the Seventh Circuit's more rigorous test, which if applied here would not change the outcome of this case.

C. Petitioner's Case Is Not Justiciable because Petitioner Cannot Prevail Under any Circuit's Definition of "Manifest Disregard of Law."

Even assuming *arguendo* that there were cognizable differences among the circuit courts' definition or application

of the manifest disregard standard (as shown above, there are not), Petitioner's case does not present an appropriate vehicle for review of this issue. Petitioner does not show, or even argue, what standard should be applied here or that a different result would have been reached using another circuit's standard.

Article III of the Constitution confines federal courts to the adjudication of actual "cases" and "controversies." Here, Petitioner fails to state a justiciable controversy because it would not be entitled to relief in *any* circuit court, under *any* statement of the manifest disregard tests that it claims the various circuits apply. Indeed, Petitioner makes no contention to the contrary. Instead, Petitioner claims that it is entitled to prevail no matter what standard for manifest disregard is used. (Pet. 15 ["whatever the precise formulation, under any meaningful standard the arbitrators in this case manifestly disregarded the law."].) Thus, the question of the standard for manifest disregard is a wholly abstract and sterile one that presents no live case or controversy here. Petitioner seeks an advisory opinion on the meaning of manifest disregard that can have no impact on this case. This Court does not issue advisory opinions on abstract legal issues. *E.g.*, *Clinton v. Jones*, 520 U.S. 681, 699 (1997).

II. THE ARBITRATORS DID NOT MANIFESTLY DISREGARD THE LAW IN DETERMINING THE DISCOUNT RATE BECAUSE THAT IS A QUESTION OF FACT, AND BECAUSE THERE IS NO GOVERNING LAW THAT THE PANEL COULD HAVE DISREGARDED.

A. Determination of a Discount Rate Appropriate to a "Particular Income Stream" Is an Inherently Fact-Based Inquiry that Is Not Suitable for Review by this Court.

Petitioner argues that the arbitrators acted in manifest disregard of law by selecting a discount rate with

which it disagrees. (Pet. 16-21.) Petitioner does not dispute that determination of a discount rate "'is a question of fact to be determined by the trier of fact.'" (Pet. App. 25a, quoting *Huggs, Inc. v. LPC Energy, Inc.*, 889 F.2d 649, 657 (5th Cir. 1989) (citing *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988)). Indeed, Petitioner itself argued to the panel that selection of a discount rate is a question of fact, not law. [R9:75.6:4393.][12]

Instead, Petitioner tries to turn the arbitrators' factual determination of an appropriate discount rate into not just a legal error – which would not be reviewable[13] – but a manifest disregard of law. Petitioner argues that the rate selected is wrong for "'this particular income stream.'" (Pet. 17.) But Petitioner's emphasis on the necessity of selecting a rate for a particular income stream only underscores the fact-specific nature of the arbitrators' task. To select an appropriate discount rate for the peculiar set of facts at issue here, the arbitrators could not turn to an established formula, but had to weigh the evidence

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[12] It is well-established that this Court does not grant *certiorari* to review factual disputes in the ordinary case, let alone in the context of an arbitral decision. Supreme Court Rule 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-11 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. . . . [E]stablished law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision.").

[13] *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.").

and expert testimony and assess the risks over a 25-year period. As the record shows, this is exactly what they did.

Petitioner misconstrues the record to obfuscate this fact. For example, Petitioner states that the arbitrators "announced" their chosen discount rate before the contract was terminated, even though they had "heard no expert or other testimony supporting the rate they selected." (Pet. 20.) This implies that the arbitrators arbitrarily chose a discount rate without hearing or considering any evidence. To the contrary, the record establishes that the arbitrators did not select a discount rate until *after* they had heard and considered testimony from both sides' experts. As the arbitrators explained in the first partial award, "[b]oth parties adduced evidence and made submissions concerning the appropriate discount rate to be used to assess the present value of the future income stream. [Bridas'] position was that 7.5% is appropriate. The [Turkmenian parties] contended for 19.1%. Its analysis was based on a fair market value approach which we reject, but in our opinion [Bridas'] rate is too low and does not adequately reflect risk and the provisions of the contract." [RE5:4706.] Rather than adopt either side's estimates, the arbitrators explained, they "conclude[d] that a rate of 10.446%" was proper. [*Id.*]

The arbitrators further stated in their final partial award that they had considered the expert testimony and the risks at issue in arriving at the chosen rate as well as Petitioner's arguments opposing the rate:

> The conclusion [as to the present value of Bridas' lost income stream] is rooted in the positions taken by the parties, some of which were accepted and some of which were not, a consideration of the mathematical relationship which is revealed by a consideration of those positions and the opinion of the arbitrators as to what was a fair assessment of the present value. The resulting number is not a mathematical calculation. It was neither determined nor expressed as

> such. It is a conclusion of judgment that flows out of the arbitrators' consideration of the positions advanced by the parties. Those positions were themselves based on the estimates of experts, which derived from their judgments of a number of factors. The [Turkmenian parties] would have the arbitrators bound to accept completely the judgment of one set of experts and to reject completely the judgment of the other set of experts. The arbitrators were not required to do so and did not do so.

[RE9:5231-33.] Petitioner's suggestion that the arbitrators picked a number without hearing evidence is thus misleading.

Petitioner also inaccurately states (without citation to the record) that there was "undisputed evidence that a discount rate in the range of 19.1% was appropriate and represented a fair market value rate of return." (Pet. 20.) While one of Petitioner's experts testified that a 19.1% rate was appropriate, his opinion was certainly not "undisputed." As demonstrated by the passages above, Bridas' expert argued that a 7.5% rate was appropriate. Other experts, including Petitioner's, posited different rates.[14] Thus, the arbitrators heard evidence and decided the factual question of the appropriate discount rate. This factual question is not suitable for review by this Court.

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[14] *E.g.*, Petitioner's expert's 1/7/00 Revised Estimate of Damages at 16, R10:75.13:4163 (showing a range of possible discount rates from 14% to 23+%); Respondent's expert's 6/12/98 report at ¶ 75 R11:75.24:3951 (demonstrating that the opinion of Petitioner's expert placed Respondents' cost of capital between 12.1% and 15.1% on a nominal basis; adjusted for inflation this yields rates of 9.6% to 12.6%, encompassing the arbitrators' chosen rate).

B. Petitioner Can Point to No Law that the Arbitrators Disregarded, Consciously or Otherwise.

To establish manifest disregard, Petitioner was required to demonstrate that the arbitrators disregarded governing English law. But Petitioner did not and cannot do so.

Indeed, Petitioner itself informed the arbitrators that there is no English law compelling the use of a particular discount rate, or of a methodology for determining the rate: "A search of English cases failed to reveal any breach of contract cases that specifically address the proper method for determining a discount rate at which to discount anticipated future profits back to present value." [R9:75.6:4395.] Petitioner also directed the arbitrators to American cases for the proposition that "the selection of a discount rate is not a matter of law but rather a question of fact within the province of the fact finder." [*Id.* at 4393 (citing *Huggs, Inc.*, 889 F.2d 649); *see also id.* at 4392-4393 (noting that appeals courts "have upheld a wide range of discount rates selected by [a] jury on the ground that sufficient evidence in the trial court record supported the jury's decision").] Having correctly informed the arbitrators that there was no binding legal precedent and that selection of a discount rate was a question of fact within their discretion, Petitioner cannot now claim that the arbitrators' selection of the rate of 10.446% was in "manifest disregard" of the law.

The only English law to which Petitioner cites in its Petition consists of hornbook principles stating that (1) damages must be reduced to present value, (2) a present value discount must take into account the relative degree of risk entailed in a given enterprise, and (3) the victim of a breach should not be put in a better position than he would have occupied but for the breach. (Pet. 16, 18.) Petitioner fails to show that the arbitrators disregarded these principles, because (1) it is undisputed that

the panel ordered damages to be reduced to present value, (2) the record demonstrates that the panel took into account numerous risks in choosing a discount rate, and (3) there is no way to calculate lost future damages to an absolute certainty, so the arbitrators selected a discount rate within the "ballpark" of estimates supported by the evidence. Their decision was thus legally proper. *See, e.g., Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 546-553 (1983) (rejecting argument that future damages should be calculated or discounted according to an established rule of law, and observing that courts should not "embark on a search for 'delusive exactness because "[i]t is perfectly obvious that the most detailed inquiry [into lost future income] can at best produce an approximate result").

Since Petitioner cannot establish that the panel disregarded any governing law, it cannot establish that they did so "consciously." Petitioner nevertheless argues that the panel made a "conscious decision not to apply the law" because it repeatedly rejected Petitioner's arguments in favor of a different discount rate. (Pet. 19-21.) According to Petitioner, the panel's refusal to change the rate demonstrates that the arbitrators "felt boxed in" by their original decision. (Pet. 20.) This is pure speculation that cannot support a showing of legal error, much less a manifest disregard of law, even assuming there were a governing law at issue that could have been disregarded.

Petitioner's argument that the rate chosen by the arbitrators could not have been the "correct" rate because the parties applied the same rate to a loan in another setting simply does not turn a factual finding into a manifest disregard of law. The arbitrators' decision to "disregard" Petitioner's *argument* that they should have selected a particular rate is not by any stretch of the imagination a manifest disregard of law.

C. Petitioner's Oblique References to the Law of other Circuits Fail to Create a Ground for Review.

Petitioner cites to *Coutee*, 336 F.3d 1128, *Montes*, 128 F.3d 1456, and *Halligan*, 148 F.3d 197, to suggest that the Ninth, Eleventh, and Second Circuits would have applied the manifest disregard standard to vacate the arbitrators' fact-finding here. (Pet. 17-18.) As discussed in Section III, *supra*, however, none of these cases supports vacatur of an arbitral award on evidentiary grounds. In *Montes*, the Eleventh Circuit vacated an arbitral award because it was clear that the arbitral panel had consciously disregarded applicable law. 128 F.3d at 1459, 1461-62. *Halligan* too was based on "the traditional manifest disregard of the law standard." *GMS Group*, 326 F.3d at 78 ("[In *Halligan*], we could only conclude that [the arbitrators] had disregarded [the law], as any other explanation would strain credulity given the quantity and quality of evidence. . . ."). And in *Coutee*, the Ninth Circuit confirmed that the circuit courts do not review arbitral awards for manifest disregard of the facts, and declined appellant's invitation to reweigh the evidence. 336 F.3d at 1131-34.

The Ninth Circuit also confirmed in *Coutee* "the unexceptional proposition that a federal court will not confirm an arbitration award that is legally irreconcilable with the undisputed facts." *Id.* at 1134 ("In some circumstances, . . . legally dispositive facts are so firmly established that an arbitrator cannot fail to recognize them without manifestly disregarding the law."). However, Petitioner's case does not fit into this category. The only undisputed fact Petitioner points to is the fact that the discount rate selected by the arbitrators – 10.446% – was the same as the one used by the parties in a separate loan agreement. The fact that this rate was used in other circumstances, however, does not eliminate this rate from the universe of legally supportable discount rates appropriate here. As discussed above and in the panel's awards,

10.446% falls between the highest and lowest rates estimated by the parties' experts.

Finally, Petitioner argues it would have fared better in a circuit that does not allow arbitrators to award punitive damages when the contract does not allow them. (Pet. 19.) But the Fifth Circuit stated that it, too, would have vacated the award had the panel in fact awarded punitive damages. (Pet. App. 27a.) Instead, the court held, "there is simply no colorable argument that an award of punitive damages was embedded in the arbitrator's determination of the discount rate, given our conclusion . . . that the arbitrator[s] did not manifestly disregard the law in setting the discount rate." (Pet. App. 28a.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

February 16, 2004

Respectfully submitted,

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(3)

No. 03-1018

In the Supreme Court of the United States

STATE CONCERN TURKMENNEFT,

Petitioner,

v.

BRIDAS S.A.P.I.C.; BRIDAS ENERGY INTERNATIONAL, LTD.; INTERCONTINENTAL OIL & GAS VENTURES, LTD.; BRIDAS CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondents do not deny a circuit conflict over the meaning and scope of the manifest disregard of law standard of review. Instead, they attempt to narrow it to a conflict between the Seventh Circuit and the other circuits and contend that it is irrelevant to this case. As demonstrated below, the circuits are deeply divided over this important issue of federal law, and petitioner would prevail under the proper standard.

Respondents admit (at 5) that the discount rate selected by the arbitrators was the same rate that the parties' joint venture agreement specified for the short-term FPC loan. Instead of trying to explain how a rate appropriate for secure short-term debt could possibly be appropriate for risky long-term equity, they dismiss this logical impossibility as an issue of fact. But the arbitrators could not have made such an inherently contradictory ruling—and then refused to correct it after being made aware of it—without disregarding the *law* requiring that a discount rate reflect repayment risk.

I. The Lower Courts Are Deeply Divided Over The Meaning Of Manifest Disregard Of The Law.

1. Respondents' contention (at 10) that petitioner waived its right to raise this conflict by failing to do so below is bizarre. A circuit conflict is a ground for granting a petition for certiorari (S. Ct. Rule 10), not a ground for reversal in the court of appeals. Petitioner therefore had no reason to raise the circuit conflict to the Fifth Circuit. This Court never has suggested that a party must raise a circuit conflict in the court of appeals to preserve its right to petition for certiorari.

2. The petition (at 7-12) demonstrates the recognition of courts and commentators that the lower courts are in disarray over the meaning and scope of the manifest disregard of law standard. Respondents (at 10-11) say this is the view of but a "handful" of students. But D.C. Circuit Judge Edwards notes

that "manifest disregard of the law [has] not been defined by the Court, and the circuits have adopted various formulations." *Where are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. U. L. Rev. 293, 303 (1999). Judge Easterbrook agrees that the understanding of "manifest disregard" by his own and "other circuits" has been "confused." *George Watts & Son* v. *Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (attributing confusion to this Court's "opaque" dictum). And Professor William Park recently contrasted the "restrictive view" of manifest disregard espoused by some courts with the "expansive view" of others. *The Specificity of International Arbitration*, 36 Vand. J. Transnat'l L. 1241, 1250 (2003).

Similar commentaries abound. In addition to those cited in the petition, see Albert Besser, *The Arbitrator Blew It! Now What?*, 29 Vt. B.J. 39, 42 (Summer 2003) (courts "flip and flop" over manifest disregard); Michael Landrum & Dean Trongard, *Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights*, 24 Wm. Mitchell L. Rev. 345, 376 (1998) (noting "uncertainty" among courts about meaning of manifest disregard); Kenneth Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. Rev. 255, 306-307 (1998) (noting "controversy among the federal courts" over meaning of manifest disregard); Julian Moore, Note, *Arbitral Review (or Lack Thereof)*, 100 Colum. L. Rev. 1572, 1586 (2000) ("lower courts continue to debate the validity and scope of this judicial standard"); Victoria Holstein, *Co-Opting the Federal Judiciary*, 12 World Arb. & Mediation Rep. 276, 284 (2001) (urging this Court to "articulate a cogent, workable standard" for a "meaningful application" of the manifest disregard standard "by the lower federal courts").

3. This widely recognized circuit conflict has not been "manufacture[d]" by petitioner, as respondents contend (at 19). Although respondents assert that all circuits other than the Seventh adhere to the same standard, their string cite of

cases (at 13 n.9) purporting to support this proposition actually *confirms* the deep division among the circuit courts.

Respondents' cited cases differ over whether an arbitrator's disregard must be deliberate to warrant vacatur. Some require that the arbitrator "refused" to heed the law. *Nationwide Mut. Ins. Co.* v. *Home Ins. Co.*, 330 F.3d 843, 847 (6th Cir. 2003). Others say the award need only be "irreconcilable" with the law (*Advest, Inc.* v. *McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990)) or that the arbitrator "proceed[ed] to ignore it" (*Schoch* v. *InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003)). Some authorize vacatur where the arbitrators *either* "refused" to apply the law *or* simply "ignored" it. *Banco de Seguros* v. *Mut. Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003); *LaPrade* v. *Kidder, Peabody & Co.*, 246 F.3d 702, 706 (D.C. Cir. 2001). Still others merge intent and negligence into a "willful inattentiveness" standard. *Sheldon* v. *Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001). Thus, respondents are plainly wrong when they assert (at 19) that "all of the circuits" require a "knowing or intentional" disregard of the law. Respondents' cases reflect other differences as well. One requires that the arbitrator "correctly state the law" (*Upshur Coals Corp.* v. *United Mine Workers*, 933 F.2d 225, 229 (4th Cir. 1991)), while another requires only that the law be "well defined, explicit, and clearly applicable" (*Prestige Ford* v. *Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003)).

4. Respondents attempt to collapse all this variation into what they call (at 1, 2, 16, 17) a "traditional test"—"the arbitrator understood the existence of a governing legal principle but decided to ignore it." But some of respondents' cases apply very different tests. One says an award manifestly disregards the law if it is "legally irreconcilable with the undisputed facts." *Coutee* v. *Barington Capital Group, L.P.*, 336 F.3d 1128, 1133 (9th Cir. 2003). Another equates manifest disregard with "arbitrators' gross misconduct." *Flex-Foot, Inc.* v. *CRP, Inc.*, 238 F.3d 1362,

1366 (Fed. Cir. 2001). Neither comports with the purported "traditional test." Further, respondents admit that at least one circuit in addition to the Seventh recognizes a non-traditional test for manifest disregard, authorizing vacatur where the award "is contrary to the plain language of the contract." Opp. 21-22, citing *Wonderland Greyhound Park, Inc.* v. *Autotote Sales, Inc.*, 274 F.3d 34, 36 (1st Cir. 2001).

Respondents (at 21) cannot squeeze *Montes* v. *Shearson Lehman Bros.*, 128 F.3d 1456, 1459 (11th Cir. 1997), or *Halligan* v. *Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998), into their "traditional test." In *Montes*, as respondents note (at 21), the arbitrators were urged to deviate from the law, but nothing indicates they in fact did so as required under respondents' "traditional" test. *Halligan* does not suggest the arbitrators knew of the law they disregarded. As Judge Edwards observes, "there was no legal error identified"; "the court simply found the evidence of discrimination so overwhelming [that] it could only have been the product of manifest disregard of the law, the evidence, or both." Edwards, *supra*, at 306. The difficulties that a later Second Circuit panel had in explaining the manifest disregard analysis in *Halligan* (Opp. 20) simply underscore the continuing confusion over this issue. For example, in a recent decision, the court initially described the standard as *objective*, based on the perception of an "average person qualified to serve as an arbitrator," and then as *subjective*, requiring that the arbitrator "*knew* of the governing legal principle but chose to ignore it." *Huntington Hosp.* v. *Huntington Hosp. Nurses' Ass'n*, 2004 WL 291956, at *5 (E.D.N.Y. Feb. 10, 2004) (emphasis added).

The lower courts' differing approaches have practical consequences for parties contemplating arbitration. Companies operating in different regions of the country should not face different odds on judicial review depending on where the action is filed. Respondents' contention that this conflict is diminishing is refuted by their own

recognition (at 15, 17) that "the Seventh Circuit *recently* adopted a *new*, very stringent standard for manifest disregard" in conflict with the standards of "all other circuit courts." Respondents (at 17) downplay this evidence of a sharpening split by stating that adoption of the Seventh Circuit's standard "would not change the outcome in this case." But petitioner need not show that it would prevail under each of the standards offered by the circuit courts. It is enough to show the significant conflict over this important federal question, note that only this Court can establish a uniform standard, and recognize that petitioner should have an opportunity to make its case under the proper standard.

II. The Award Cannot Stand Under The Proper Standard.

1. Respondents (at 23) say this case presents "no live case or controversy" because the awarded discount rate would be upheld under any manifest disregard standard. But it is premature to determine which party will prevail on the merits. The issue at this stage is whether the question presented is certworthy. If the courts are divided over an important issue of federal law, as we have demonstrated, this Court may appropriately use this case to resolve it.

2. Furthermore, petitioner *would* prevail under a number of standards adopted by the courts of appeals. The award at issue is "legally irreconcilable with the undisputed facts," the test in *Coutee*, 336 F.3d at 1133, because it is mathematically certain that using a short-term secure debt rate to discount a long-term risky revenue stream from the same enterprise will inflate value beyond actual damages. The award thus rests "on reasoning so palpably faulty that no judge [could] conceivably have made such a ruling," the test in *Prudential-Bache* v. *Tanner, Inc.*, 74 F.3d 234, 238 (1st Cir. 1995), because no judge would order such a palpably inapplicable discount rate and thereby inflate damages by $200 million. Further, the award is "contrary to the plain language of the

contract," the test in *Wonderland*, 274 F.3d at 36. The joint venture agreement not only designated the 10.446% rate for a short-term and secure loan, but also barred "consequential, punitive or other similar damages." RE12 at 6339. Contrary to respondents' assertion (at 22), petitioner consistently has sought to vacate the award on this basis because the ordered discount rate multiplied actual damages. See Pet. 19.

3. Petitioner also would prevail under the standard it urges here, which would authorize modification or vacatur of an award that egregiously departs from established legal principles. Pet. 13-14 (awards should be vacated for "extreme deviations from governing law" to prevent "unwarranted windfalls"). Courts and commentators have recognized that such a standard would ensure the integrity of the law while maintaining the advantages of arbitral resolution. See *Garrity* v. *McCaskey*, 612 A.2d 742, 747 (Conn. 1992) (defining manifest disregard as an "extraordinary lack of fidelity to established legal principles") (Peters, C.J.); Norman Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 513 (1998).

This standard would address this Court's insistence that agreeing to arbitrate merely selects a forum and does not surrender "substantive rights." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); accord *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 229-230 (1987). Agreeing to arbitrate *would* risk a surrender of substantive rights unless a court may correct extreme deviations from governing law. This Court also has insisted that, with respect to federal statutory claims, judicial review must be "sufficient to ensure that arbitrators comply with the requirements of the statute at issue." *Gilmer*, 500 U.S. at 32 n.4, quoting *McMahon*, 482 U.S. at 232. Such meaningful review is needed to ensure compliance with *any* governing law applicable to the parties' dispute, whether or not its source is a federal statute. As the D.C. Circuit has

explained, ensuring that arbitrators adhere to law to the same extent as courts requires a "manifest disregard of the law standard [that] is sufficiently rigorous." *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

Further, the proposed standard would comport with the contractual basis of arbitration. Parties agreeing to arbitrate presumably do not contemplate an award egregiously at odds with established law. Such a standard also reflects how some courts have handled manifest disregard challenges in practice. *Halligan*, *Montes*, and other cases recognize that, notwithstanding the high level of deference accorded to arbitrators, courts must have the authority to overturn awards that egregiously flout the law. Such a standard remains narrow, indeed considerably narrower than the scope of review applied to trial court judgments. As Professor Poser has observed, this is a "workable standard that represents an acceptable balance between the finality that is an important goal of arbitration and the accuracy and fairness that are fundamental to the rule of law." Poser, *supra*, at 518.

4. The confusion plaguing the lower courts involves more than how to *articulate* the proper test. Whatever the formulation, the standard must be meaningfully *applied* to rein in outlandish departures from the law. Guidance is needed from this Court, which has never explained how to apply the manifest disregard standard it originated, to ensure that it is applied properly and uniformly. For example, respondents' "traditional test" does not tell a court how to tell whether "the arbitrator understood the existence of a governing legal principle" nor whether he "decided to ignore it." Must an arbitrator expressly state that he knows the law but will not apply it? If so, indefensible awards will escape meaningful review because only a foolish arbitrator would make such a statement. Or can manifest disregard be inferred from the award and the arbitral submissions? How should a court determine whether disregard of the law was deliberate? If that requirement is too stringent, arbitrators that flout the

law will be sustained simply because they keep their reasoning hidden. These questions need answers to prevent gross and intolerable departures from governing law.

Application of this standard should not depend on showing that the arbitrator *knew* the law, as respondents insist (at 19-20) and some courts continue to hold. See *Shanghai Foodstuffs Import & Export Corp.* v. *International Chem., Inc.*, 2004 WL 213019, at *3 (S.D.N.Y. Feb. 4, 2004) (requiring "acknowledgment by the arbitrators" of applicable law). It is unrealistic to require parties or expect courts to establish such knowledge because, without a written opinion, courts would have to "work backwards from the result reached in the arbitration." Stephen Hayford, *A New Paradigm for Commercial Arbitration*, 66 Geo. Wash. L. Rev. 443, 469 (1998). Moreover, a knowledge-of-the-law requirement would encourage proliferation of legal arguments and citations to preserve this ground for review. Such formalism would undermine the speed and economy promised by arbitration and unduly complicate judicial review proceedings. It also would encourage arbitrators "not to find out what the law is." Poser, *supra*, at 515. An extreme deviation from clear and established law should be subject to vacatur regardless of the arbitrator's subjective knowledge.

Nor should a "deliberate" refusal to apply the law be required. Not only would proving an arbitrator's intent be impractical and unduly complicate judicial review, but nothing in the term "manifest disregard" requires such intent. "Manifest" means "obvious to the understanding." BLACK'S LAW DICTIONARY 962 (6th ed. 1990). "Disregard" means "take no notice of" or "ignore" or "overlook." *Id.* at 472. Hence, so long as the arbitrator ignored obvious legal principles, an award should be subject to modification or vacatur for manifest disregard of the law.

5. Adoption of a meaningful standard will not undermine arbitral finality. Mere disagreements with an

arbitrator's legal interpretation will remain insufficient. The "vast majority" of arbitrations hinge on factual findings. Edwards, *supra*, at 304. Where the law is disputed, "the best way to ensure that an arbitral forum is neutral, fair, and legitimate is to allow meaningful judicial review." *Id.* at 302. Armed with this understanding, courts would be less hesitant to ensure arbitrators' fidelity to the law. In this case, the court of appeals may well have reached a different result, even under its articulated test, if it had understood that the "high degree of deference" to arbitrators (Pet. App. 26a) did not bar it from finding that a legally impermissible and logically contradictory discount rate manifestly disregarded the law.

6. Respondents assert (at 27) that petitioner identified "no law" because it stated to the arbitrators that no English "breach of contract" cases specifically address determination of a discount rate. But the very next sentence in petitioner's brief to the arbitrators explained that other English cases *do* address that issue. For example, a property rights case, *Dir. of Buildings & Lands* v. *Shun Fung Ironworks Ltd.*, 2 A.C. 111, 132 (P.C. 1995), addressed the proper discount rate to determine "[t]he present value of a stream of profits expected over a period of years." In the course of evaluating competing discount rate proposals, the court explained that "[t]he greater the risk" the recipient "may not receive in due course the future payments," the "higher the rate of return he will require." *Ibid.* Petitioner consistently has relied on *Shun Fung* and other English authorities to show that a discount rate must reflect the relative risk of nonrecovery and that discounting a revenue stream by a rate applicable to a stream of lesser risk is mathematically certain to provide a windfall rather than the actual damages required by English law. See Pet. 16. Respondents ignore these authorities and do not cite a single English case. Like the arbitrators, they disregard legal principles that preclude use of the same rate both to discount long-term/risky equity and to finance short-term/secure debt.

Respondents' charge (at 28) that there is no evidence of "disregard" also is inaccurate. As the petition explains (at 3-4, 19-20), the arbitrators boxed themselves in by selecting a discount rate before determining liability and damages. This is not "pure speculation" (Opp. 28)—respondents do not contest that the arbitrators declared the discount rate before the contract terminated. And petitioner does not argue that the arbitrators heard no evidence on the discount rate (Opp. 25) but rather that they plucked the FPC rate out of the joint venture agreement without any support and then ignored petitioner's demonstration that use of the FPC rate necessarily inflated damages beyond the legal maximum.[1]

Respondents devote but a short paragraph (at 28) to petitioner's showing that this central contradiction compromises the award. They call the imposition of a legally impermissible discount rate a "factual finding" and "not by any stretch of the imagination a manifest disregard of law." This naked assertion confirms respondents' inability to show how such a discount rate comports with the law. It is not enough that the arbitrators may have taken risk "into account" (*ibid.*). They were *legally required* to distinguish relative risks in adopting a discount rate, especially with hundreds of millions of dollars at stake. Respondents' final defense of the ordered rate (at 29-30)—that it fell between the two parties' estimates—does not speak to whether the arbitrators disregarded governing law in imposing it.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[1] Respondents contend (at 5, 26 n.14) that petitioner's expert favored a discount rate between 9.6% and 12.6%. In fact, the cited testimony addressed only the cost of capital, a mere component of the discount rate. R3951-52. He testified that "[t]he minimum discount rate applicable to a venture of this type is 19.1 percent." R4134.

Respectfully submitted.

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